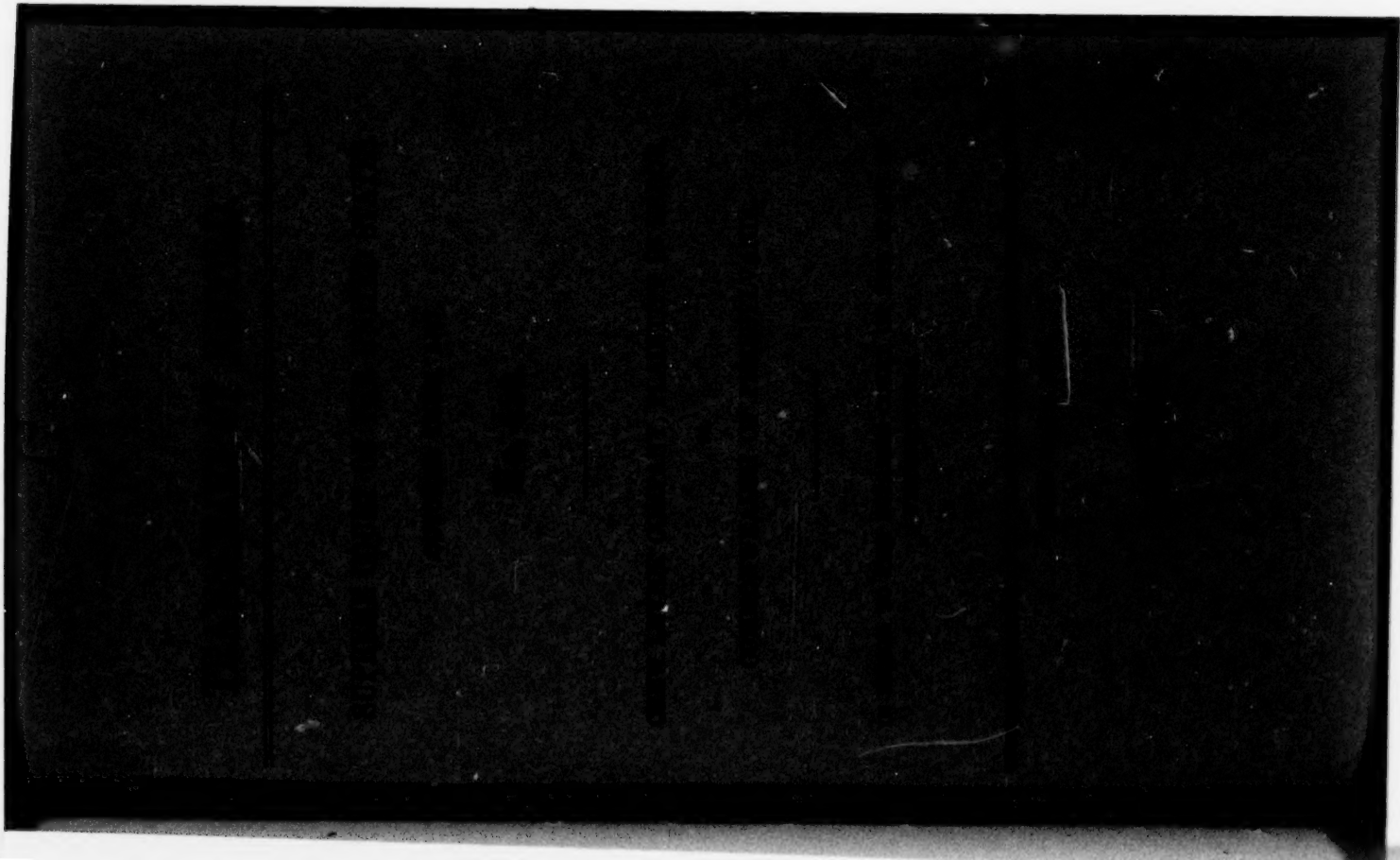

(25,948)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 499.

CREW LEVICK COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

	Original.	Print
Transcript of record from the court of common pleas No. 4 of Philadelphia county	1	1
Case stated	1	1
Opinion, Carr, J.	4	3
Assignments of error	19	11
Opinion and judgment *per curiam*	20	11
Bond on writ of error	21	12
Writ of error	22	13
Citation and service	24	14
Assignments of error	25	15
Stipulation as to transcript of record	31	18
Certificates to transcript of record	34	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 13, 1917.

1 C. P. No. 4, March Term, 1914.

No. 5454.

COMMONWEALTH OF PENNSYLVANIA

vs.

CREW LEVICK COMPANY, a Corporation of the State of Pennsylvania.

Case Stated.

And now, this Sixth day of April A. D. 1916, it is hereby agreed by and between the parties to the above case that the following case be stated for the opinion of the Court in the nature of a special verdict.

The Crew Levick Company is a corporation duly incorporated under the laws of the Commonwealth of Pennsylvania and is engaged in the business of buying and selling petroleum and other petroleum products, and maintains its principal office and warehouse, etc., at the Southeast corner of Mifflin Street and Commercial Avenue in the 39th Ward of the City of Philadelphia and State of Pennsylvania.

In the year 1913, from the said warehouse located in the City of Philadelphia, State of Pennsylvania, it sold and delivered at wholesale to purchasers residing in the City of Philadelphia products to the value of $47,103.64 and to customers in foreign countries such as Great Britain, Holland and France, products to the value of $430,496.36.

These sales to customers in foreign countries are made in the following manner: Agents of the Crew Levick Company in these
2 foreign countries take orders for petroleum and other petroleum products which orders are then transmitted to the Crew Levick Company at its office in Philadelphia, State of Pennsylvania; in some cases orders are sent direct by the customers in foreign countries to the Crew Levick Company. These orders thus transmitted, if approved by the Crew Levick Company at its office in Philadelphia, State of Pennsylvania, are then made up at its warehouse at Mifflin Street and Commercial Avenue and the petroleum and other petroleum products are then shipped by the Crew Levick Company from its warehouse in Philadelphia to its customers in the foreign countries.

The Board of Mercantile Appraisers of the County of Philadelphia under the provisions of the Act of Assembly, approved May 2nd, 1899, (P. L. 184) has assessed the Crew Levick Company as a wholesale vendor of merchandise to the extent of $477,600.00, being the amount of the whole volume of gross business transacted in the year 1913, and made up of the two items of $47,103.64 and $430,496.36, respectively, as above set forth; and fixing the mercantile license tax

at the sum of $242.30, being a license tax assessed upon it based upon the amount of its gross annual receipts for the preceding year as specified in said Act of Assembly; and further notified defendant that it would be unlawful for it to carry on business without payment of said license tax and procuring of a license. The defendant duly appeared before the Board of Mercantile Appraisers and admitted that it is liable for the payment of a wholesale mercantile license tax upon the amount received from the sales of petroleum and other petroleum products to purchasers residing in the City of Philadelphia. The Crew Levick Company protested against the
3 assessment of a wholesale license tax based upon the whole gross receipts for the reason that any tax which included in the basis of its assessment the gross receipts from merchandise shipped to foreign countries would be a tax levied by the United States of America upon commerce with foreign nations in violation of Article 1, Section 8, of the Constitution of the United States, and would also be an impost or duty on exports levied by the State of Pennsylvania without the authority of an Act of Congress in violation of Article 1, Section 10, of the Constitution of the United States.

The said Board of Mercantile Appraisers refused to reduce the said assessment and confirmed the same and an appeal was taken to the Court of Common Pleas of Philadelphia County which appeal was duly perfected as of the term and number of this case stated.

If the Court be of the opinion that the Crew Levick Company is required by law to pay a mercantile license tax upon the total gross receipts of its business for the year 1913, including the gross receipts from merchandise shipped to foreign countries as above set forth, then judgment should be entered for the plaintiff in the sum of $242.30, together with costs; but, if not, then judgment should be entered only in the sum of $27.05, and plaintiff to pay the costs. Either party reserves the right to appeal to the Superior Court and the Supreme Court.

JOSEPH L. KUN,
Deputy Attorney General. Attorney for Plaintiff.
DAVID WALLERSTEIN,
Attorney for Defendant.

Endorsement: C. P. No. 4. No. 5454. March T. 1914. Commonwealth of Penna. vs. Crew Levick Company, a corporation of the State of Pa. Case stated. Filed April 6, 1916. Stewart. David Wallerstein, Attorney at law, 607 Land Title Building, Philadelphia.

4 C. P. No. 4, March Term, 1914.

No. 5454.

COMMONWEALTH OF PENNSYLVANIA

vs.

CREW LEVICK COMPANY, a Corporation.

Case Stated.

CARR, *J.:*

The question arises under the provisions of the Act of May 2nd, 1899, sec. 1, P. L. 184, imposing a mercantile license tax which provides * * * "every wholesale vendor of or wholesale dealer in goods, wares, merchandise shall pay an annual mercantile tax of $3.00, and all persons so engaged shall pay one-half a mill on every dollar of the whole volume gross of the business transacted annually."

The appellant claims that the tax was improperly levied as being imposed upon foreign commerce, and the contention is made, citing Knisley vs. Cotterel, 196 Pa., 614 and Cook vs. Pa., 97 U. S., 566; Nicol vs. Ames, 173 U. S. 509, that the tax is levied on goods by reason of their sale, or in other words, a tax upon the sale of goods. Its contention is that in so far as it is thus assessed upon sales made by a dealer in Pennsylvania to purchasers in foreign countries, it is a tax and burden upon foreign commerce and a regulation of foreign commerce and is therefore unconstitutional. On the other hand, the Commonwealth's contention is that the act does not provide for a tax on sales, and has not been so levied, but is on every dollar of the whole volume of the gross business transacted annually.

Two distinct thoughts are expressed in section 1 referred to: in the first place, there is a description of the persons who shall
5 pay the tax. The words vendor, dealer, goods, wares, merchandise and mercantile appear, and to make use of the dictionary definitions, a vendor is one who vends or one who transfers the exclusive right of possessing a thing either his own or that of another as his agent for a price or pecuniary equivalent. And a dealer is one who deals or does a distributing business as distinguished from that of manufacturer or producer; or one who traffics or trades; or who does business; and a merchant is one who traffics on a larger scale, especially with foreign countries; and mercantile means of or pertaining to merchants, or the business of merchants, having to do with trade, or the buying and selling of commodities. Commercial is the wider term being sometimes used to embrace mercantile, but in the stricter use, commercial relates to the shipping, freighting, forwarding and other business connected with the commerce of the country, whether external or internal; or the exchange of commodities; while mercantile applies to the sale of merchandise and goods when brought to market; but as the two employments are to some

extent intermingled, the two words are often interchanged. (See Webster's Dictionary.)

So that, while the first thought in the section 1 of the act describing the persons who shall pay the tax, indicates merchants who make sales, yet in the second thought of the section which indicates the subject matter upon which a tax is to be imposed, the word sales is not used, but the words are every dollar of the whole volume gross of the business transacted annually; and business is defined to be that which engaged the time, attention or labor of any one as his principal concern or interest; whether for a longer or shorter time; or any particular occupation or employment engaged in for livelihood or gain, as in agriculture, trade, art or profession; financial dealings, buying and selling, traffic in general; or mercantile transactions. (See Webster's Dictionary.) In other words, the subject matter of the tax is the engagement of the time, attention or labor of any one of the persons mentioned in the preceding thought, measured or graduated by its volume in dollars; and not the fact that such engagement of time, attention or labor happens to result in the sales of goods, wares or merchandise, among whose many legal factors or elements, in some cases, may be a delivery in a foreign country.

The two distinct thoughts in this section first received the attention of a court in Knisley v. Cotterel, Simonton, P. J. reported in 196 Pa. St. 614 (1900). In the opinion of the lower court, all of the cases are cited and considered and it is said: "On the analogy of these and many like cases that might be cited, we are of opinion that the tax in question here is a tax, not on the property of the dealers or vendors, but on their business transacted during the preceding year measured by its volume in dollars." Upon appeal, this well considered judgment was affirmed, Mitchell, J., (196 Pa. St. 626) and it is said: "The foundation on which this argument rests, it will be perceived, is that the tax is laid specifically upon property. Conceding for present purposes that this is its true character, does the consequence necessarily follow that it is so wanting in uniformity as to transgress the constitutional restrictions? Assuming it to be intended as a tax on property, the basis of distinction in the legislative intent clearly was property kept for sale by regular dealers in the course of their business, and the tax was graduated and classified by the amount and method of the sales. The purpose for which property is kept or used has long been a recognized and to some extent a favorite basis for distinction in taxation. * * * This subject will be further considered later on, but enough has been said here, we think, to show that even as a tax on property it is not unconstitutional for want of uniformity. But another and even clearer ground upon which this act can be sustained is that the tax imposed is not specifically on property but on the business of selling. * * * As already said, even regarding it as a tax upon property directly, it could be sustained as a classification according to the use and purposes for which the property is held. But an examination of the details of the provisions of the present act makes it clear that the tax, as held by the learned judge below, is upon the

business of vending merchandise, and that the classification is based on the manner of sale, and within each class the tax is graduated according to the gross annual volume of business transacted. This is apparent from the fact that the amount of the tax over the small fixed license fee is determined in every case by the volume of business, measured in dollars, and the rate at which it is to be levied is according to the manner of sale."

This construction of section 1 has been uniformly followed without qualification by later decisions in this State. In Commonwealth v. Bailey, 20 Sup. Ct., 210 (1902), it was held that the act applied to corporations and that the fact that a corporation has paid the tax required at the time of its incorporation and has annually paid the whole amount of the corporation tax assessed upon the whole value of its capital stock and assets, does not relieve the corporation from the payment of the mercantile tax, if it engages in the business of buying and selling goods. The bonus is the consideration
8 paid to the state for granting the charter, and is not a tax; while the tax on the capital stock is a tax on the property of the corporation, whereas the mercantile tax is a tax upon the business of vending merchandise. It is said: p. 218, Rice, P. J., "The nature and subject of the tax imposed by the act of 1899, have been authoritatively determined in the case of Knisely v. Cotterel, 196 Pa. 614," and after quoting Simonton, J. and Mitchell, J., supra, "It is thus seen, that whilst the declared purpose of the tax is to provide revenue, in which respect it does not differ from the capital stock tax, the subject of taxation is not the same. In one case it is the property and assets invested in the business, and is measured by the value, in the other case it is the business itself, and is not measured by the value of the property invested or the profits, but the volume of the sales." In Commonwealth, Appellant v. Pocono Mountain Ice Co., 23 Sup. Ct. 267 (1903) it was held that the act of May 2, 1889 was intended to deal only with mercantile pursuits, and that a corporation owning a large body of land and water and engaged in the business of taking natural ice from its own lake, storing the same in its own warehouses upon the margin thereof, and selling such ice to such persons as order it in carload lots, is not liable for the mercantile license tax imposed by the Act of May 2, 1889, P. L. 184. It is said that the statute in question imposed a tax upon business of a designated character, and not upon property; citing Knisely v. Cotterel, supra; Commonwealth v. Bailey, supra. In Commonwealth v. Banker Brothers, 38 Sup. Ct., 103, 1909, it was held that when goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property and amenable to its
9 laws, provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being from another state, but only taxed in the usual way as other goods are. "If therefore the tax imposed by the Act of 1899 be regarded as a tax upon property, it is one which the state has power to impose. Should the tax be regarded as a tax upon trade or the business of vending merchandise, as it in Pennsylvania has been held to be (citing Knisely v. Cotterel, supra: Commonwealth

v. Bailey, supra) then the power of the state to impose such a tax is sustained by the decision of the supreme court of the United States in Ficklens v. Shelby County Taxing Dist. 145 M. L. 1." In Commonwealth, Appellant v. Eynon-Evans Mfg. Co., 48 Sup. Ct., 474 (1912), in holding that a corporation engaged in manufacturing brass ware and selling only its own products is not liable to pay a mercantile license tax as a wholesale vendor under certain circumstances, it was said: "The mercantile license tax has been declared to be 'a tax upon business of a designated character and not upon property,' Knisely v. Cotterel, supra. And in Commonwealth v. Thomas Potter, it was said to be 'A tax levied on a mode of doing business and not upon the persons.'"

These Pennsylvania decisions sustain the right of the Commonwealth to impose the tax in the case at bar, and the fallacy in the contention of the appellant which professes to be decisive of the matter at issue, is that in Knisely vs. Cotterel, supra, the court meant that it was a tax on the sales of the property and therefore a tax on the goods sold. If the subject matter of the tax had been directly of sales, it would have been invalid; but as it is a tax on business is not so, although indirectly it may be a tax on sales; or as it is sometimes expressed, its natural operation and effect does not
10 render it a prohibitive exaction.

In Nicol v. Ames; Skillen v. Ames, 173 U. S. 509 (1899), it was held that when an act of Congress is claimed to be unconstitutional, the presumption is in favor of its validity, and it is only when the question is free from any reasonable doubt that this court should hold an act of the law-making power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. In P. & S. Steamship Co. v. Pennsylvania, 122 U. S. 326 (1887): it was held that a state tax upon the gross receipts of a steamship company incorporated unders its laws, which are derived from the transportation of persons and property at sea, between different states, and to and from foreign countries, is a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution; and it was said: "The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different states, and between the states and foreign countries, and from the charter of its vessels which was for the same purpose. * * * The corporate franchises, the property, the business, the income of corporations created by a state may undoubtedly be taxed by the state; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. This principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence." In a Case of the State Freight Tax, 15 Wall, 232 (1872), it was
11 held that the transportation of freight or of the subjects of commerce, is a constituent part of commerce itself and a tax upon freight transported from State to State is a regulation of com-

merce among the States. Whenever the subjects in regard to which a power to regulate commerce is asserted are in their nature National or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress. The transportation of passengers or merchandise through a State or from one State to another is of this nature, hence a statute of a State imposing a tax upon freight taken up within the State and carried out of it or taken up without the State and brought within it, is repugnant to that provision of the Constitution of the United States, which ordains that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes. It was said: "It has been repeatedly held that the constitutionality or unconstitutionality of a State tax is to be determined not by the form or agency through which it is to be collected but by the subject upon which the burden is laid * * *. Upon what then is the tax imposed by the act of August 25th, 1864 to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be nor is it in fact, a tax upon the franchise of the carrying companies or upon their freight or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carrier. The companies are required to pay to the State treasurer for the use of the Commonwealth 'on each two thousand pounds of freight carried' a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved
12 one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight." In Kansas City v. Botkin, 240 U. S., 227 (1916) it was held that a State cannot lay a tax on interstate commerce in any form by imposing it either upon business constituting such commerce or on the privilege of engaging in it or upon the receipts as such derived therefrom, and whether a State tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, depends upon the operation and effect of the tax as enforced and not upon the manner in which the taxing scheme has been characterized. The State has authority to tax a domestic corporation for the privilege of being a corporation and such a tax is not necessarily invalid because measured on the capital stock, part of which may represent capital not subject to the taxing power of the State. A state is not debarred from imposing a tax upon the granted privilege of being a corporation because the corporation may engage in interstate commerce. The validity of each tax must be decided upon its own facts, and a tax within the taxing power of the State will not be condemned as repugnant to the Federal Constitution, unless its natural operation and effect render it a prohibited exaction. In Singer Sewing Machine Co. v. Brickell, 233 U. S. 304 (1914), where a separate license tax was imposed by the state of Alabama on the business of selling or delivering sewing machines, it was said "The statute under consideration does not in direct terms or by necessary inference manifest an intent to regulate or burden interstate commerce. Full and fair

effect can be given to this provision and an unconstitutional meaning can be avoided by indulging the natural presumption that the
13 legislature was intending to tax only that which it constitutionally might tax." In Thomas Co. v. United States, 237 U. S. 19 it was held (1915) taxes on policies of marine insurance on exports are within the prohibitions of the Federal Constitution, and it was said: "Is the tax upon such policies as directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition? It is manifest that we are not called upon to deal with transactions which merely anticipate exportation or with goods that are not in the course of being actually exported. (Citing cases.) Nor have we to do in the present case with the taxation of the insurance business as such or with the power of the State to fix the conditions upon which foreign corporations may transact that business within its borders. (Citing cases.) Let it be assumed as this court has said that the insurance business generally is not commerce, that the contract of insurance is a personal contract,—an indemnity against the happening of a contingent event. The inquiry still remains whether policies of insurance against marine risks during the voyage in foreign ports are not so vitally connected with exporting that the tax on such policies is essentially upon the exportation itself." In Robbins v. Shelby County Taxing District, 120 U. S. 489 (1886), where the state of Tennessee enacted that all drummers and all persons not having a regular licensed house of business in the taxing district of Shelby County, offering for sale, or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee a certain tax, it was held to be a regulation of commerce among the states: but it was said that a state may enact laws which in practice operate to effect commerce among the states—as by
14 providing in the legitimate exercise of its police power and general jurisdiction, for the security and comfort of persons and the protection of property: by establishing and regulating channels for commercial facilities; by the passage of inspection laws and laws to restrict the sale of articles injurious to health and morals by the imposition of taxes upon avocations within its borders not interfering with foreign or interstate commerce or employment or with business exercised under authority of the Constitution of the United States. In Ficklen v. Shelby County Taxing District, 145 U. S., 1. (1892): F. and C. Co. were commercial agents or brokers, having an office in Shelby County, Tennessee, where they carried on that business. In 1887 they took out licenses for their business, under the provisions of a statute of Tennessee imposing a tax upon factors, brokers, buyers or sellers on Commission, or otherwise, doing business within the state, and it was held that if the tax could be said to affect interstate commerce in any way it did so incidentally, and so remotely as not to amount to a regulation of such commerce, and it was said: "No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax, the fact that

the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

15 In the case of Coe vs. Errol, 116 U. S. 517, it appeared that a large number of spruce logs, that had been cut in the state of New Hampshire, were floated down and placed on the bank of a stream in the town of Errol, New Hampshire, to be from thence floated down the river to the state of Maine to be manufactured and sold, and the selectmen of Errol appraised and assessed the logs for taxation. The question was whether the products of a state are liable to be taxed like other property within the state, although intended for exportation from the state and partially prepared for that purpose by being deposited at a place of shipment: and it was said: "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. This question does not present the predicament of goods in course of transportation through a state, though detained for a time within the state by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another state, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination.

16 "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin but as a part of the general mass of property of that state, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the state. Of course they cannot be taxed as exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation, for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any state, without the consent of Congress, from laying

any imposts or duties on imports, or exports; and, although it has been decided * * * that this clause relates to imports from and exports to foreign countries, yet, when such imposts or duties are laid on imports or exports from one state to another, it cannot be doubted that such an imposition would be a regulation of commerce among the states, and therefore void as an invasion of the exclusive power of Congress * * * But if such goods are not taxed as exports, nor by reason of their exportation or intended exportation, but are taxed as part of the general mass of property in the State, at the regular period of assessment for such property and in the usual manner, they not being in course of trans-
17 portation at the time, is there any valid reason why they should not be taxed?" In Turpin v. Burgess, Collector, 117 U. S. 504 (1886) it was held that the exportation stamp required to be affixed to every package of tobacco intended for exportation, before its removal from the factory, declared to be constitutional; as an excise laid on tobacco, before its removal from the factory, is not a duty on exports on articles exported, within the prohibition of the Constitution, even though the tobacco be intended for exportation; and it was said: "In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation, they might never be exported; whether they would be or not would depend on the will of the manufacturer."

These and many other cases have been carefully examined and the conclusion is reached that the contention of the appellant cannot be sustained. The license tax in suit has not been assessed upon sales made by a dealer in Pennsylvania to purchasers in foreign countries. It is not a tax or burden upon foreign commerce and a regulation of foreign commerce, as appears from the cases referred to; and the question is controlled by the decisions in this state of Knisley v. Cotterel, supra, and of the other Pennsylvania cases referred to since the date of that decision.

It is the opinion of the court that the Crew Levick Company is required by law to pay a mercantile license tax upon the total gross receipts of its business for the year 1913, including the gross receipts for merchandise shipped to foreign countries, as set forth in the case stated, and that judgment shall be entered in favor of
18 the plaintiff in the sum of $242.30, together with costs.

WM. WILKINS CARR, J.

May 9, 1916.

Endorsement: C. P. 4. 5454. March, 1914. Com'th of Pa. vs. Crew Levick Co. Opinion. Carr, J. Filed May 9, 1916. Stewart Pro Prothy.

19 In the Supreme Court of Pennsylvania, for the Eastern District, January Term, 1916.

No. 206.

COMMONWEALTH OF PENNSYLVANIA, Plaintiff and Appellee.

vs.

CREW LEVICK COMPANY, a Corporation of the State of Pennsylvania, Defendant and Appellant.

Assignments of Error.

1. The learned Court below erred in entering judgment for the plaintiff, the Commonwealth of Pennsylvania, on the Case Stated, in the sum of $242.30.

2. The learned Court below erred in not entering judgment on the Case Stated for the plaintiff, the Commonwealth of Pennsylvania, in the sum of $27.05.

DAVID WALLERSTEIN,
Attorney for Defendant and Appellant.

Endorsement: In the Supreme Court of Pa., Eastern District. No. 206. Jan. T., 1916. Commonwealth of Penna. Pl'f & Appellee, vs. Crew Levick Company, Def't & Appellant. Assignments of Error. Filed Oct. 24, 1916. In Supreme Court. David Wallerstein, Attorney at law, 607 Land Title Building, Philadelphia.

20 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1916.

No. 206.

COMMONWEALTH OF PENNSYLVANIA,

v.

CREW LEVICK COMPANY, Appellant.

Appeal from C. P. No. 4, Philadelphia.

Filed Feb. 19, 1917.

Per CURIAM:

The judgment in this case is affirmed, on the following from the opinion of the learned court below directing it to be entered: "The license tax in suit has not been assessed upon sales made by a dealer in Pennsylvania to purchasers in foreign countries. It is not a tax or burden upon foreign commerce and a regulation of foreign com-

merce, as appears from the cases referred to; and the question is controlled by the decisions in this state of Knisley vs. Cotterel, 196 Pa., 614, and of the other Pennsylvania cases referred to since the date of that decision."

Endorsement: 206. January Term, 1916. Commonwealth of Pennsylvania v. Crew Levick Company, Appellant. Appeal from C. P. No. 4, Phila. Judgment affirmed Per Curiam. Filed Feb. 19, 1917. In Supreme Court, J. H. B.

21 Know all men by these presents, that we, Crew Levick Company a corporation of the State of Pennsylvania, as principal, and Fidelity & Deposit Company of Maryland, as sureties, are held and firmly bound unto Commonwealth of Pennsylvania in the full and just sum of One thousand dollars ($1,000) *dollars*, to be paid to the said Commonwealth of Pennsylvania, certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally, by these presents. Sealed with our seals and dated this nineteenth day of April, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a session of the Supreme Court of Pennsylvania in a suit depending in said Court, between Commonwealth of Pennsylvania, Plaintiff and Appellee and Crew Levick Company, Defendant and Appellant as of January Term 1916, No. 206, a judgment for $242.30, interest and costs was rendered against the said Crew Levick Company and the said Crew Levick Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Pennsylvania citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Crew Levick Company shall prosecute said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CREW LEVICK COMPANY,
By F. ROYAL HAMMETT, [SEAL.]
Vice President.

Sealed and delivered in presence of—

CHARLOTTE MORTON, [SEAL.]
As to Crew Levick Co.

Attest:

HENRY L. LEVICK, [SEAL.]
Secretary.

Approved by—

MAHLON PITNEY, [SEAL.]
Associate Justice of the
Supreme Court of the United States.

4/19/17.

FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
[SEAL.] HERMAN HOOPES,
Resident Vice-President.

Attest:
M. E. HILL,
Resident Assistant Secretary.

Endorsement: Filed Apr. 23, 1917. In Supreme Court.

22 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Pennsylvania before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Crew Levick Company, Plaintiff in Error and Commonwealth of Pennsylvania, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or im-
23 munity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Crew Levick Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected,

the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the nineteenth day of April, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas—

MAHLON PITNEY,
Associate Justice of the
Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States, October Term, 1916. Crew Levick Company, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Writ of Error. Filed Apr. 23, 1917. In Supreme Court.

24 UNITED STATES OF AMERICA, *ss:*

To Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Pennsylvania wherein Crew Levick Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this nineteenth day of April, in the year of our Lord one thousand nine hundred and seventeen.

MAHLON PITNEY,
Associate Justice of the Supreme Court
of the United States.

24½ On this — day of ——, in the year of our Lord one thousand nine hundred and —, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

Sworn to and subscribed the — day of ——, A. D. 190–.

—— ——.

PHILA., April 23, 1917.

I hereby accept service of the within citation.

JOSEPH L. KUN,
Deputy Attorney General of Pa.,
Attorney for Commonwealth of Pennsylvania,
Defendant in Error.

Filed Apr. 23, 1917. In Supreme Court.

25 In the Supreme Court of Pennsylvania for the Eastern District, January Term, 1916.

No. 206.

COMMONWEALTH OF PENNSYLVANIA

vs.

CREW LEVICK COMPANY, a Corporation of the State of Pennsylvania, Appellant.

Assignments of Error.

On this 5th day of April, 1917, comes Crew Levick Company, Appellant in the Supreme Court of Pennsylvania, and Plaintiff in Error in the Supreme Court of the United States, by David Wallerstein, its attorney, and says that in the record and proceeding, decision and final judgment of the Supreme Court of Pennsylvania in the above entitled matter there is manifest error in this, to wit:

1. The Supreme Court of Pennsylvania erred in affirming the judgment and overruling Appellant's first assignment of error in the said Supreme Court of Pennsylvania, which first assignment of error was as follows:

"1. The learned Court below erred in entering judgment for the plaintiff, the Commonwealth of Pennsylvania, on the Case Stated, in the sum of $242.30."

26 and the said Crew Levick Company, in support of the said Assignment of Error claims that there is included in the amount of the said judgment for $242.30, so directed to be entered by the Supreme Court of Pennsylvania, the sum of $215.25, being the amount of a tax levied by the Commonwealth of Pennsylvania by virtue of the Act of Assembly of the said Commonwealth of Pennsylvania, dated the 2d day of May, 1899 (P. L. 184) entitled "An Act to provide revenue by imposing a mercantile license tax on vendors of or dealers in goods, wares, or merchandise, and providing for the collection of the said tax." upon the amount of sales made by the said Crew Levick Company to persons in foreign nations, and which tax the said Crew Levick Company claimed in both the Court of original jurisdiction and in the Supreme Court of Pennsylvania was invalid by reason of its being both a tax on commerce

with foreign nations in violation of Article I, Section VIII of the Constitution of the United States, and a duty or impost laid on exports by the State of Pennsylvania without authority of an Act of Congress in violation of Article I, Section X of said Constitution of the United States.

Which decision of the Supreme Court of Pennsylvania was in favor of the validity of a Statute of the said State of Pennsylvania, the validity of which Statute on the ground of its being repugnant to the Constitution of the United States was specially questioned and denied by the said Crew Levick Company.

2. The Supreme Court of Pennsylvania erred in affirming the judgment and overruling the Appellant's second Assignment of Error, which second assignment of error was as follows:

27 "2. The learned Court below erred in not entering judgment on the Case Stated for the plaintiff, the Commonwealth of Pennsylvania, in the sum of $27.05"

and the said Crew Levick Company in support of said Assignment of Error claims that judgment should have been entered against the said Crew Levick Company for the said sum of $27.05 instead of the sum of $242.30 because the said sum of $242.30 included the sum of $215.25, being the amount of a tax levied by the Commonwealth of Pennsylvania by virtue of the Act of Assembly of the said Commonwealth of Pennsylvania, dated the 2d day of May, 1899 (P. L. 184), entitled "An Act to provide revenue by imposing a mercantile license tax on vendors of or dealers in goods, wares of merchandise, and providing for the collection of the said tax" upon the amount of sales made by the said Crew Levick Company to persons in foreign nations, and which tax the said Crew Levick Company claimed in both the Court of original jurisdiction and in the Supreme Court of Pennsylvana was invalid by reason of its being both a tax on commerce with foreign nations in violation of Article I, Section VIII of the Constitution of the United States and a duty or impost laid on exports by the State of Pennsylvania without authority of an Act of Congress, in violation of Article I, Section X of said Constitution of the United States.

Which decision of the Supreme Court of Pennsylvania was in favor of the validity of a Statute of the said State of Pennsylvania, the validity of which Statute on the ground of its being repugnant to the Constitution of the United States, was specifically questioned and denied by the said Crew Levick Company.

28 3. The Supreme Court of Pennsylvania erred in affirming the judgment of the lower Court in the above entitled matter, the said lower Court being the Court of Common Pleas No. 4 of the County of Philadelphia, and State of Pennsylvania, and in declaring in affirming said judgment in its opinion as follows:

"Per CURIAM:

The judgment in this case is affirmed on the following from the opinion of the learned Court below directing it to be entered: "The license tax in suit has not been assessed upon sales made by a dealer

in Pennsylvania to purchasers in foreign countries. It is not a tax or burden upon foreign commerce and a regulation of foreign commerce, as appears from the cases referred to; and the question is controlled by the decisions in this state of Knisley vs. Cotterel, 196 Pa. 614, and of the other Pennsylvania cases referred to since the date of that decision."

and the said Crew Levick Company in support of the said Assignment of Error claims that the license tax in question was levied under the authority of an Act of the State of Pennsylvania dated the 2d day of May, 1899 (P. L. 184) entitled "An Act to provide revenue, by imposing a mercantile license tax on vendors of or dealers in goods, wares or merchandise, and providing for the collection of the said tax" upon the amount of sales made, and upon the sales made, by a dealer in Pennsylvania to purchasers in foreign countries, which said mercantile license tax the Crew Levick Company claimed in both the Court of original jurisdiction and in the
29 Supreme Court of Pennsylvania was invalid by reason of its being both a tax on commerce with foreign nations in violation of Article I, Section VIII of the Constitution of the United States, and a duty or impost laid on exports by the State of Pennsylvania without authority of an Act of Congress in violation of Article I, Section X of said Constitution of the United States.

Which decision of the Supreme Court of Pennsylvania was in favor of the validity of a Statute of the said State of Pennsylvania, the validity of which Statute on the ground of its being repugnant to the Constitution of the United States was specially questioned and denied by the said Crew Levick Company.

Wherefor for these manifest errors appearing in the record, the said Crew Levick Company, Appellant in the Supreme Court of Pennsylvania, and Plaintiff in Error in the Supreme Court of the United States prays that the judgment of the said Supreme Court of Pennsylvania be reversed and set aside and that judgment be rendered granting it, the said Crew Levick Company, its rights under the Constitution, Statutes and laws of the United States.

DAVID WALLERSTEIN,
Of Counsel for Crew Levick Company.

30 [Endorsed:] Supreme Court of Pa. No. 206. Jan. T., 1916. Commonwealth of Pennsylvania vs. Crew Levick Company, a corporation of the State of Pennsylvania, Appellant. Assignments of Error. Filed Apr. 6, 1917. In Supreme Court. David Wallerstein, Attorney at law, 607 Land Title Building, Philadelphia.

31 In the Supreme Court of the United States, October Term, 1916.

Writ of Error to the Supreme Court of Pa.

In the Supreme Court of Pa., Eastern District.

No. 206.

CREW LEVICK COMPANY, Plaintiff in Error,

vs.

COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Stipulation as to Transcript of Record.

It is hereby agreed and stipulated between David Wallerstein, Counsel for Plaintiff in Error, and Joseph L. Kun, Deputy Attorney General of the State of Pennsylvania, Counsel for defendant in Error that the following portions of the record in the above case in the Supreme Court of Pennsylvania shall constitute the transcript of record on Writ of Error to the Supreme Court of the United States:

1. Case Stated filed in the Court of Common Pleas No. 4 of Philadelphia County.
2. Opinion of the Court of Common Pleas No. 4 of Philadelphia County directing judgment to be entered for the Commonwealth of Pa.
3. Assignments of Error filed in the Supreme Court of Pennsylvania to the finding of the Court below, to wit: C. P. No. 4 of Philadelphia County.
4. Opinion of the Supreme Court of Pennsylvania affirming the judgment of the Court below.

32 5. Assignments of Error to the judgment of the Supreme Court of Pennsylvania filed by Plaintiff in Error in the Supreme Court of Pennsylvania.

DAVID WALLERSTEIN,
Attorney for Crew Levick Company,
Plaintiff in Error.

JOSEPH L. KUN,
Attorney for Commonwealth of Pennsylvania,
Defendant in Error.

April 30th, 1917.

33 [Endorsed:] Supreme Court of Pa. No. 206. Eastern District. Crew Levick Company, Pl'f in Error, vs. Commonwealth of Pennsylvania, Def't in Error. Stipulation as to Transcript of Record. Filed May 3, 1917. In Supreme Court. David Wallerstein, Attorney at law, 607 Land Title Building, Philadelphia.

34 I, J. Hay Brown, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, that William A. Stone was, at the time of signing the annexed attestation, and now is, prothonotary of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 7th day of May, A. D. one thousand nine hundred and seventeen.

[Seal of the Supreme Court of Pennsylvania, 1776, Eastern District.]

J. HAY BROWN.

I, William A. Stone, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, that the Honorable J. Hay Brown by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 7th day of May, A. D. one thousand nine hundred and seventeen.

[Seal of the Supreme Court of Pennsylvania, 1776, Eastern District.]

WILLIAM A. STONE.

35 STATE OF PENNSYLVANIA,
Eastern District:

I, William A. Stone, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District, do hereby certify that the above and foregoing is a true copy of the Record embraced in the Stipulation filed in the above entitled cause, so full and entire as appears of Record in said Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Philadelphia, this 7th day of May, A. D. 1917.

[Seal of the Supreme Court of Pennsylvania, 1776, Eastern District.]

WILLIAM A. STONE,
Prothonotary.

Endorsed on cover: File No. 25,948. Pennsylvania Supreme Court. Term No. 1118. Crew Levick Company, plaintiff in error, vs. Commonwealth of Pennsylvania. Filed May 8th, 1917. File No. 25,948.

Office Supreme Court, U. S.
FILED
MAY 29 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

October Term, 1916.

No. [redacted] 499

CREW-LEVICK COMPANY, *Plaintiff in Error,*

vs.

COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

MOTION TO ADVANCE CASE.

JOSEPH L. KUN,
Deputy Attorney General.
FRANCIS SHUNK BROWN,
Attorney General.
Attorneys for Defendant in Error.

IN THE

reme Court of the United States

October Term, 1916.
No. 1118.

EW-LEVICK COMPANY, *Plaintiff in Error,*

vs.

'OMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

MOTION TO ADVANCE.

he Honorable Edward Douglass White, Chief stice, and the Associate Justices of the said urt:

e Commonwealth of Pennsylvania, Defendant in r, respectfully moves the Court to advance the ng in the above stated case.

is case involves the question of the application Act of Assembly of the Commonwealth of Pennnia, approved May 2, 1899, (Pamphlet Laws 184), h is entitled:

"An act to provide revenue by imposing a mercantile license tax on venders of or dealers in goods, wares and merchandise, and providing for the collection of said tax."

Section 1 of said Act provides, inter alia, as follows:

> "* * * Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual merchantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually. * * *"

The Plaintiff in Error having been assessed by the Board of Mercantile Appraisers of Philadelphia County, State of Pennsylvania, for tax in the sum of $242.30 under the said act, based on "the whole volume, gross," of business transacted by it during the year 1913, it filed its appeal on May 26, 1914 to the Court of Common Pleas of Philadelphia County, Pennsylvania, as of March Term, 1914, No. 5454, said appeal being the method of reviewing the action of the said Mercantile Appraisers.

On April 6, 1916, an agreement was made between the parties to the suit, to wit, the Commonwealth of Pennsylvania, Plaintiff, and Crew-Levick Company, Defendant, that a case should be stated for the opinion of the Court in the nature of a special verdict. In said case stated filed it was set forth that the Crew-Levick Company claimed to be exempt from the assessment as a wholesaler under the Mercantile License Tax Act of Pennsylvania so far as "the whole volume, gross" of its business, used as a basis for the tax, included charges on account of sales made by the said Crew-Levick Company to persons in foreign countries, exemption being claimed on the ground that the assessment of such tax as to such portion thereof was in violation of Article I, Section 8 of the Constitution of the United States, providing that "Congress shall have power * * * * to regulate commerce with foreign nations," and that it was also in violation of Article I,

Section 10 of the Constitution of the United States as being an impost or duty on exports levied by the State of Pennsylvania without the authority of an Act of Congress.

That in said case stated it was also set forth that of the said tax of $242.30 only the sum of $27.05 was chargeable if only wholesale sales other than those to persons in foreign countries were taken into consideration, and that if the Court should be of the opinion that the liability of said Crew-Levick Company for assessment under the language of the Act "on each dollar of the whole volume, gross, of business transacted annually," included as a basis therefor charges on account of sales to persons in foreign countries, judgment should be entered for the Plaintiff, the Commonwealth of Pennsylvania, in the sum of $242.30, but, if not, judgment should be entered for the Commonwealth of Pennsylvania in the sum of $27.05.

That subsequently said Court of Common Pleas No. 4 of Philadelphia County in an opinion by the Honorable William Wilkins Carr, one of the Judges thereof, sustained the assessment as to the whole volume gross of the business of the Crew-Levick Company transacted during the year 1913, including as the basis therefor charges on account of sales made to persons in foreign countries. On May 9, 1916 judgment was entered for the Commonwealth of Pennsylvania in said suit for the sum of $242.30.

On May 19, 1916, the said Crew-Levick Company appealed to the Supreme Court of Pennsylvania from the judgment so entered in the Court of Common Pleas No. 4 of Philadelphia County, said appeal being entered as of January Term, 1916, No. 206, and that on February 19, 1917, the said Supreme Court of Pennsylvania, being the Court of last resort of the said State, affirmed the said judgment of the said Court of Common Pleas.

That a Writ of Error was allowed by Mr. Justice

Pitney on April 19, 1917, and the case brought to this Court.

The reason for this application is that so long as this case remains undetermined the several counties of the State of Pennsylvania are embarrassed in enforcing the said Mercantile License Tax Act and in the collection of taxes and assessments thereunder, as sustained by the Supreme Court of the State of Pennsylvania.

Wherefore, the Commonwealth of Pennsylvania respectfully asks that the case be advanced to such time as may suit the convenience of the Court.

Joseph L. Kun.
Deputy Attorney General.

.....
Attorney General.
Attorneys for Defendant in Error.

15

FILED
SEP 8
JAMES D.

IN THE

Supreme Court of the United States.

No. 499. October Term, 1917.

CREW LEVICK COMPANY,
Plaintiff in Error,

v.

COMMONWEALTH OF PENNSYLVANIA.

Writ of Error to the Supreme Court of Pennsylvania.

BRIEF FOR THE PLAINTIFF IN ERROR.

CHARLES A. FRUEAUFF,
DAVID WALLERSTEIN,
Counsel for Crew Levick Co.,
Plaintiff in Error.

International, 30 Chestnut St., Philadelphia.

INDEX.

Page

Statement of the Case 1

The Statute 3

Assignments of Error 4

Argument 7

I. The Statute, as construed by the Pennsylvania Courts, does not levy the tax upon the capital employed 8

II. The Pennsylvania Mercantile License Tax so far as it is assessed upon export sales made to foreign countries bears upon foreign commerce so directly as to amount to a regulation of foreign commerce in an immediate manner, 13

(a) The Pennsylvania Mercantile License Tax is a tax upon sales and in effect a tax upon the goods sold 15

(b) A tax levied by a State, which is in effect a tax on goods sold in foreign commerce is a regulation of foreign commerce, and is therefore unconstitutional 18

(c) A tax which fluctuates with the amount of foreign sales is necessarily a tax upon foreign commerce and a regulation of it, and is on that account unconstitutional 21

(d) A tax imposed upon the manufacture or production of a particular article is essentially different from a tax imposed upon its sale. The former may be constitutional, while the latter is not 26

(e) Even if it be a franchise or privilege tax, the mercantile license tax is unconstitutional 28

(f) The mercantile license tax assessed in this case is not in the true sense of the term a franchise or privilege tax 29

INDEX—Continued.

Page

III. The Mercantile License Tax is unconstitutional, because it it is a duty or impost upon exports levied by a State without the requisite grant of authority by the Congress, 32

(a) That a tax upon an instrumentality employed in exportation is a duty or impost upon exports themselves 33

(b) A tax levied upon export sales is therefore necessarily a duty or impost on exports 34

IV. Inasmuch as the judgment of the Supreme Court of Pennsylvania included the amount of the tax upon foreign commerce, which tax was also a duty or impost on exports, it must be reversed 35

TABLE OF CASES.

Page

Almy vs. California, 24 Howard 169 33

Brennan vs. Titusville, 153 U. S. 289 .....19, 28

Brown vs. Maryland, 12 Wheaton 419 32

Coe vs. Errol, 116 U. S. 517 17

Commonwealth vs. Bailey, Banks & Biddle Co., 20 P. S. C. 210..9, 11, 15

Commonwealth vs. Banker Bros., 38 P. S. C. 102 10

Commonwealth vs. Childs Dining Co., 32 P. S. C. 467 .....10, 29

Commonwealth vs. Crew Levick Co., 256 Pa. 508 12

Commonwealth vs. Eynon-Evans Mfg. Co., 48 P. S. C. 474 11

Commonwealth vs. Pennsylvania Coal Co., 2 Pearson 402 26

Commonwealth vs. Potter, 159 Pa. 584 .....8, 29

Commonwealth vs. Standard Oil Co., 101 Pa. 119 15

Cook vs. Pennsylvania, 97 U. S. 566 .....17, 18, 28

Cornell vs. Coyne, 192 U. S. 418 .....27, 28

Davis vs. Virginia, 236 U. S. 697 .....19, 28

Fairbanks vs. U. S., 181 U. S. 283 33

Ficklen vs. The Taxing District of Shelby County, 145 U. S. 1,
11, 23, 24, 25, 28

Flint vs. Stone Tracy Co., 220 U. S. 107 .....30, 31

Galveston &c. Ry. Co. vs. Texas, 210 U. S. 217,
13, 21, 22, 23, 24, 25, 28, 32

Kansas City Ry. Co. vs. Kansas, 240 U. S. 227 .....19, 20, 21, 28, 29

Knisely vs. Cotterel, 196 Pa. 614 .....8, 9, 11, 12, 14, 15, 25, 29

Maine vs. Grand Trunk Ry. Co., 142 U. S. 217 .....22, 32

Nicol vs. Ames, 173 U. S. 509 .....16, 25, 28

Phila. &c. S. S. Co. vs. Penna., 122 U. S. 326 .....21, 22

Pullman Co. vs. Kansas, 216 U. S. 56 .....19, 28

Rearick vs. Pa., 203 U. S. 507 .....18, 28

Robins vs. Shelby Taxing District, 120 U. S. 489 .....18, 28

Singer Sewing Machine Co. vs. Brickell, 233 U. S. 304 18

State Tax on Railroad Freight, 15 Wall. 232 21

TABLE OF CASES—Continued.

Page

Stockard vs. Morgan, 185 U. S. 27 ..... 25, 28

Thames Ins. Co. vs. U. S., 237 U. S. 19 34

Turpin vs. Burgess, 117 U. S. 504 35

U. S. vs. Hvoslef, 237 U. S. 1 33

U. S. vs. Knight Co., 156 U. S. 1 27

Western Union Telegraph Co. vs. Kansas, 216 U. S. 1 ..... 19, 28

IN THE

Supreme Court of the United States.

October Term, 1917. No. 499.

CREW LEVICK COMPANY,

Plaintiff in Error,

v.

COMMONWEALTH OF PENNSYLVANIA.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case involves the question whether the Mercantile License tax imposed by the State of Pennsylvania under Act of May 2, 1899 (P. L. 184) in so far as it is assessed upon the amount of export sales made by a Pennsylvania corporation to purchasers in foreign countries is obnoxious to Article 1, Section 8, of the Federal Constitution, which provides, among other things, "The Congress . . . shall have power to regulate commerce with foreign nations," and is obnoxious to Article 1, Section 10, of the Federal Constitution, which declares that "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws."

This case is brought by the defendant and plaintiff in error, the Crew Levick Company, to the Supreme Court of the United States by a writ of error to the Supreme Court of Pennsylvania.

In the year 1913 the Crew Levick Company as a wholesale vender sold merchandise to the extent of $477,600. Of this amount $430,496.36 were sales made to purchasers in foreign countries, such as Great Britain, Holland and France. The balance, $47,103.64, were domestic sales. The Board of Mercantile Appraisers for the County of Philadelphia, in the State of Pennsylvania, which Board under the Mercantile License Tax Act makes the assessment, assessed the Crew Levick Company upon the total amount of these sales. The Crew Levick Company appealed from this assessment upon the ground that the foreign sales should not be included in the assessment, for the reason that to base the tax upon them would be both to regulate commerce with foreign nations and to levy an impost or duty upon exports. The Board decided this appeal adversely to the Company, which, thereupon, took an appeal to the Court of Common Pleas No. 4, of Philadelphia County, Pennsylvania, the action there taking the form of a suit in assumpsit by the Commonwealth of Pennsylvania against the Company. The matter was submitted to the court upon a case stated, agreed upon between the parties, and was decided against the contention of the Company. The Company, thereupon, took an appeal to the Supreme Court of Pennsylvania, which affirmed the judgment of the lower court.

The total amount of the taxes assessed against the Company was $242.30, for which amount judgment was entered in the Court of Common Pleas against defendant. Of this amount the sum of $27.05 was covered by the tax on domestic sales, the amount of which is not disputed by the defendant. If, therefore, this court should reverse the judgment of the Supreme Court of

Pennsylvania, judgment will, nevertheless, be entered against the defendant for $27.05. If the judgment of the Supreme Court of Pennsylvania should be affirmed, the amount of the judgment will remain as below.

THE STATUTE.

The tax assessed in this case by the State of Pennsylvania upon the plaintiff in error, the Crew Levick Company, is based upon the Act of Assembly of the State of Pennsylvania, approved the second day of May, 1899 (P. L. 184). The pertinent parts of this statute are Sections 1 and 2, which are as follows:

> "Section 1. Be it enacted, &c., That from and after the passage of this act, each retail vender of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of two dollars, and all persons so engaged shall pay one mill additional on each dollar of the whole volume, gross, of business transacted annually. Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually. Each dealer in or vender of goods, wares or merchandise at any exchange or board of trade shall pay a mercantile license tax of twenty-five cents on each thousand dollars worth, gross, of goods so sold.
>
> "Section 2. And it is provided that all persons who shall sell to dealers in or venders of goods, wares and merchandise, and to no other person or persons, shall be taken under the pro visions of this act be wholesalers; and all other venders of or dealers in goods, wares and merchandise shall be retailers, and shall pay an annual license tax as provided in this act for retailers."

ASSIGNMENTS OF ERROR.

1. The Supreme Court of Pennsylvania erred in affirming the judgment and overruling appellant's first assignment of error in the said Supreme Court of Pennsylvania, which first assignment of error was as follows:

> "1. The learned Court below erred in entering judgment for the plaintiff, the Commonwealth of Pennsylvania, on the Case Stated, in the sum of $242.30."

And the said Crew Levick Company, in support of the said assignment of error, claims that there is included in the amount of the said judgment for $242.30, so directed to be entered by the Supreme Court of Pennsylvania, the sum of $215.25, being the amount of a tax levied by the Commonwealth of Pennsylvania by virtue of the Act of Assembly of the said Commonwealth of Pennsylvania, dated the second day of May, 1899 (P. L. 184), entitled "An Act to provide revenue by imposing a mercantile license tax on venders of or dealers in goods, wares, or merchandise, and providing for the collection of the said tax," upon the amount of sales made by the said Crew Levick Company to persons in foreign nations, and which tax the said Crew Levick Company claimed in both the court of original jurisdiction and in the Supreme Court of Pennsylvania was invalid by reason of its being both a tax on commerce with foreign nations, in violation of Article 1, Section 8, of the Constitution of the United States, and a duty or impost laid on exports by the State of Pennsylvania without authority of an Act of Congress, in violation of Article 1, Section 10, of said Constitution of the United States.

Which decision of the Supreme Court of Pennsylvania was in favor of the validity of a statute of

the said State of Pennsylvania, the validity of which statute on the ground of its being repugnant to the Constitution of the United States was specially questioned and denied by the said Crew Levick Company.

2. The Supreme Court of Pennsylvania erred in affirming the judgment and overruling the appellant's second assignment of error, which second assignment of error was as follows:

> "2. The learned Court below erred in not entering judgment on the Case Stated for the plaintiff, the Commonwealth of Pennsylvania, in the sum of $27.05."

And the said Crew Levick Company in support of said assignment of error claims that judgment should have been entered against the said Crew Levick Company for the said sum of $27.05 instead of the sum of $242.30, because the said sum of $242.30 included the sum of $215.25, being the amount of a tax levied by the Commonwealth of Pennsylvania by virtue of the Act of Assembly of the said Commonwealth of Pennsylvania, dated the second day of May, 1899 (P. L. 184), entitled "An Act to provide revenue by imposing a mercantile license tax on venders of or dealers in goods, wares or merchandise, and providing for the collection of the said tax" upon the amount of sales made by the said Crew Levick Company to persons in foreign nations, and which tax the said Crew Levick Company claimed in both the court of original jurisdiction and in the Supreme Court of Pennsylvania was invalid by reason of its being both a tax on commerce with foreign nations in violation of Article 1, Section 8, of the Constitution of the United States, and a duty or impost laid on exports by the State of Pennsylvania without authority of an Act of Congress, in violation of Article 1, Section 10, of said Constitution of the United States.

Which decision of the Supreme Court of Pennsylvania was in favor of the validity of a statute of the said State of Pennsylvania, the validity of which statute on the ground of its being repugnant to the Constitution of the United States was specifically questioned and denied by the said Crew Levick Company.

3. The Supreme Court of Pennsylvania erred in affirming the judgment of the lower Court in the above entitled matter, the said lower court being the Court of Common Pleas No. 4, of the County of Philadelphia and State of Pennsylvania, and in declaring in affirming said judgment in its opinion as follows:

"Per CURIAM:

> The judgment in this case is affirmed on the following from the opinion of the learned Court below directing it to be entered: 'The license tax in suit has not been assessed upon sales made by a dealer in Pennsylvania to purchasers in foreign countries. It is not a tax or burden upon foreign commerce and a regulation of foreign commerce, as appears from the cases referred to; and the question is controlled by the decisions in this state of Knisley v. Cotterel, 196 Pa. 614, and of the other Pennsylvania cases referred to since the date of that decision.' "

And the said Crew Levick Company in support of the said assignment of error claims that the license tax in question was levied under the authority of an Act of the State of Pennsylvania, dated the second day of May, 1899 (P. L. 184), entitled "An Act to provide revenue by imposing a mercantile license tax on venders of or dealers in goods, wares or merchandise, and providing for the collection of the said tax" upon the amount of sales made, and upon the sales made, by a dealer in Pennsylvania to purchasers in foreign countries, which

said mercantile license tax the Crew Levick Company claimed in both the court of original jurisdiction and in the Supreme Court of Pennsylvania was invalid by reason of its being both a tax on commerce with foreign nations, in violation of Article 1, Section 8, of the Constitution of the United States, and a duty or impost laid on exports by the State of Pennsylvania without authority of an Act of Congress, in violation of Article 1, Section 10, of said Constitution of the United States.

Which decision of the Supreme Court of Pennsylvania was in favor of the validity of a statute of the said State of Pennsylvania, the validity of which statute on the ground of its being repugnant to the Constitution of the United States was specially questioned and denied by the said Crew Levick Company.

Wherefore for these manifest errors appearing in the record, the said Crew Levick Company, appellant in the Supreme Court of Pennsylvania and plaintiff in error in the Supreme Court of the United States, prays that the judgment of the said Supreme Court of Pennsylvania be reversed and set aside and that judgment be rendered granting it, the said Crew Levick Company, its rights under the Constitution, statutes and laws of the United States.

ARGUMENT.

The contention of the plaintiff in error is that as the tax in this case, levied under the Pennsylvania statute, is assessed in large part upon the amount of export sales made by the plaintiff in error to purchasers in foreign countries, it is necessarily a tax on or regulation of foreign commerce; and also a tax upon exports, and is, therefore, unconstitutional.

The argument upon which this contention is made is as follows:

I. The Statute, as Construed by the Pennsylvania Courts, Does Not Levy the Tax Upon the Capital Employed.

There had been a system of mercantile license tax in the State of Pennsylvania prior to the passage of the Act of May 2, 1899 (P. L. 184), and the Supreme Court of Pennsylvania said of the earlier acts that "a mercantile license is a tax; it is a tax levied on a mode of doing business and not upon persons." *Commonwealth v. Potter*, 159 Pa. 584.

Within a short time after the passage of the Act of May 2, 1899, its constitutionality was attacked in the State courts. The grounds of the attack upon the constitutionality of the law were many, some of them being these: That the act violated Section 1, Article 9, of the Constitution of Pennsylvania concerning uniformity of taxation; that it was not levied under a general law as required by Section 1, Article 9, of the same Constitution; that it violated the prohibition of Article 3, Section 7, of the Constitution of Pennsylvania, against local or special laws regulating the affairs of the counties, etc.; and that it was obnoxious to the Pennsylvania Bill of Rights and the fourth, fifth and fourteenth amendments to the Federal Constitution. The issues raised in the present case were not even mentioned. The Supreme Court of Pennsylvania held that the act was constitutional. *Knisely v. Cotterel*, 196 Pa. 614.

The only issue raised in *Knisely v. Cotterel* which concerns us here is that first mentioned, for in discussing that question the lower court and the Supreme Court of Pennsylvania entered very fully into an analysis of the nature of the tax. The contention was that the mercantile license tax was a tax upon property, and that as it taxed property at different rates "as against retailers and wholesalers, and again as against those dealers at an exchange or board or trade," it violated Section 1, Article 9, of the Pennsylvania Constitution,

which required that "all taxes should be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws." In the lower court, the Judge who decided the case answered this contention by declaring that it "was not a tax on the property of the dealers or venders, but on their business transacted during the preceding year, measured by its volume in dollars." *Knisely v. Cotterel, supra,* 617.

When the case got into the Supreme Court of Pennsylvania, the opinion of the court was delivered by Mr. Justice Mitchell. He began by saying that the act was frankly and professedly a revenue act, and that there were, therefore, no complications with questions under the police power. He went much further than the lower court, for he declared that even if the mercantile license tax was a tax upon property, it was nevertheless not offensive to the Constitution of Pennsylvania as not being uniform because it was a proper and permissible method of classification. However, he continued, there was another and even clearer ground for sustaining the tax because it was imposed, not specifically on property, but on the business of selling. "An examination of the details of the provisions of the present act makes it clear that the tax, as held by the learned Judge below, is upon the business of vending merchandise, and that the classification is based on the manner of sale, and within each class the tax is graduated according to the gross annual volume of business transacted." (*Knisely v. Cotterel, supra,* 630.) This description of the tax as being one upon the business of selling merchandise measured by the amount of the sales has been very generally followed ever since *Knisely v. Cotterel.*

In *Commonwealth v. Bailey, Banks & Biddle Co.,* 20 P. S. C. 210, the defendant attempted to escape the

tax upon the ground that, having paid the "bonus" upon its capital stock and having paid its capital stock tax, which by the decision of the Supreme Court of Pennsylvania was a tax upon property, it could not again be made to pay another tax on property under the Mercantile License Act. The Court brushed aside this contention, saying the bonus tax was what it paid for the privilege of being a corporation; that the capital stock tax was a tax upon its property and that the mercantile license tax was a tax upon the business of vending merchandise. It evidently escaped the attention of the Court that the mercantile license tax might be a tax upon property sold and yet be a very different thing from a tax upon the value of the capital of the company, which, indeed, is what the capital stock tax is; a distinction clearly made in a number of cases in this court.

In *Commonwealth v. Childs' Dining Co.*, 32 P. S. C. 467, the question before the Court was whether the dining company which had a number of restaurants in the city of Philadelphia, could be made to pay a separate eating house tax upon each place under the Act of April 10, 1849 (P. L. 570), imposing a tax on eating houses. It was held that it could, because, said the Court, "The amount which the eating house keeper pays for his license is not in the nature of an occupation tax, a fixed charge imposed on all who follow a certain calling; neither is it a general tax upon the particular business of buying and selling foodstuffs, whether prepared or unprepared, for immediate use." The amount of the tax was regulated by the amount of the sales, but what the tax was paid for was the privilege of keeping the particular eating house or restaurant so classified, which was all that the keeper acquired by virtue of his license.

In *Commonwealth v. Banker Bros.*, 38 P. S. C.

102, we come close to the question which is involved in the case at bar, but do not quite reach it. The defendants had a contract with the manufacturers of the Pierce-Arrow automobile, which provided that the defendants should purchase automobiles from the manufacturer and gave them the exclusive privilege of selling them again in a particular district in the State of Pennsylvania. The defendants claimed that they were nothing more than the agents of the manufacturer and that to impose a mercantile license tax on them based upon the amount of their sales was to tax a sale made in the State of New York to persons in the State of Pennsylvania and was a regulation of commerce between the States. The Court answered the contention by saying that it was no such thing, that the defendants acquired title to the automobiles which they purchased from the manufacturer, and that their tax was based upon the amount of sales made by them of goods belonging to them in the State of Pennsylvania. However, it must be admitted that the Court did say, "Should the tax be regarded as a tax upon a trade, or the business of vending merchandise, as it in Pennsylvania was held to be, *Knisely v. Cotterel,* 169 Pa. 614; *Commonwealth v. Bailey, Banks & Biddle Co.,* 20 Superior Court 210, then the power of the State to impose such a tax is sustained by the decision of the Supreme Court of the United States in *Ficklen v. Shelby County Taxing District,* 145 U. S. 1." The real point, however, upon which the case was decided was that the property in the automobiles was in the defendants and that they were selling, not as agents, but as owners.

In *Commonwealth v. Eynon-Evans Mfg. Co.,* 48 P. S. C. 474, where the question was whether the defendant was within the exemption granted to manufacturers who do not have a warehouse, the Court incidentally stated (citing *Knisely v. Cotterel*) that the

mercantile license tax was "a tax upon business of a designated character and not upon property."

Finally, of course, we have the decision of the Court of Common Pleas of Philadelphia and of the Supreme Court of Pennsylvania in the case at bar. The lower Court held that the fallacy of the contention of the plaintiff in error lay in asserting that *Knisely v. Cotterel* decided that the Court meant that it was a tax on the sales of the property, and, therefore, a tax on the goods sold. (Record, p. 6.) The opinion of the lower Court is adopted by the Supreme Court of the State. (Record, p. 11; *Commonwealth v. Crew Levick Co.*, 256 Pa. 508.)

It is interesting to note that in interpreting the act, Judge Carr, who wrote the opinion in the present case in the Court of Common Pleas, declared: "The subject matter of the tax is the engagement of the time, attention or labor of any one of the persons mentioned in the preceding thought, measured or graduated by its volume in dollars; and not the fact that such engagement of time, attention or labor happens to result in the sales of goods, wares or merchandise, among whose many legal factors or elements in some cases, may be a delivery in a foreign country." (Record, p. 4.) This conclusion is reached by adopting a definition of the word "business" in the act as that "which engaged the time, attention or labor of any one as its principal concern or interest." (Record, p. 4.) That Judge Carr erred in his definition of the word "business" in the act is shown readily enough if we insert his definition in place of the word "business" in the act itself, which will then read that a vender "shall pay one-half mill additional on each dollar of the whole volume gross of time, attention or labor of any one transacted annually." Clearly, it appears that the word "business" as used in the act means volume of sales, and to

make it mean anything else would require that, not the volume of sales, but the duration of time should be the basis of the taxation, something which the act never intended, and which can hardly be measured for the purposes of ordinary taxation.

The real question in this case is this: IS A TAX MEASURED BY THE VOLUME OF SALES ESSENTIALLY A TAX BASED UPON THE AMOUNT OF THE SALES OR RATHER UPON THE SALES THEMSELVES? If the tax is that, calling it by another name will not avail. "Neither the State courts nor the Legislature by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively important way, it will not be saved by name or form." (Mr. Justice Holmes in *Galveston, etc., Ry. Co. v. Texas,* 210 U. S. 217-227.)

II. THE PENNSYLVANIA MERCANTILE LICENSE TAX SO FAR AS IT IS ASSESSED UPON EXPORT SALES MADE TO FOREIGN COUNTRIES BEARS UPON FOREIGN COMMERCE SO DIRECTLY AS TO AMOUNT TO A REGULATION OF FOREIGN COMMERCE IN AN IMMEDIATE MANNER.

First of all, the method of assessing the mercantile license tax must be stated. At a certain time, near the beginning of every year, every vender in the city of Philadelphia is required by the Board of Mercantile Appraisers for the County of Philadelphia to fill up a blank which is furnished to him by the board, upon which blank the vender must make a return, under oath, of the goods sold for the preceding calendar year. In addition to this, the act provides for a visit to the place of business of the vender by the Board of Mercantile Appraisers in order to secure the return. This

return is not final; for the board may increase the assessment to correspond with what it believes the sales actually to have been; or the vender may appeal from the assessment which has been made if he thinks the assessment is larger than the amount of sales. The essential point is that the assessment is made upon what is supposed to be the actual sales. After the assessment is made the vender, if he be a wholesaler, is required to pay for the current year an annual fixed mercantile license tax of $3 and an additional tax of one-half mill on each dollar of the whole volume, gross, of business transacted annually. It will thus be seen that the tax for any current year is the fixed tax of $3 plus the tax of one-half mill per dollar on the sales during the preceding year.

In the case at bar, the Crew Levick Company made a return of its sales, both domestic and foreign, claiming, however, at the time that the return was made, that no tax was assessable upon the basis of the foreign sales, for the reason that such a tax would be obnoxious to the Federal Constitution, because it was both a tax upon foreign commerce and a regulation of such commerce and because it was likewise a tax upon exports.

The question before this Court is whether a tax based upon the amount of export sales, assessed and levied in the manner just narrated, amounts to a regulation of foreign commerce "in a relatively immediate way." Any one not dealing in technicalities will say at once that where a vender pays a tax based upon the amount of his sales, it is, of course, a tax upon his sales. If it be this, the tax is clearly unconstitutional. The Court of Common Pleas No. 4 of Philadelphia County attempted to escape this conclusion by declaring that the mercantile license tax, under the decision in *Knisely v. Cotterel, supra*, is not a tax upon sales, but is a tax upon the privilege of selling, which happens to be based

upon the amount of sales; but no technical reasoning and no giving of names can prevent its being a tax upon sales if it actually be such; and, of course, if such it be it is a burden upon foreign commerce.

a. The Pennsylvania Mercantile License Tax is a Tax Upon Sales, and in Effect a Tax Upon the Goods Sold.

It has been shown that the mercantile license tax is very evidently not a tax upon the capital employed by the vender. Independently of the direct declaration to this effect by the Pennsylvania courts, the reasoning of Judge Simonton, who decided *Knisely v. Cotterel* in the lower court, is conclusive on this point. "The volume of business measured in dollars fixed the amount of the tax and this seems to determine that it is a tax on the business and not on the property of the vendee or dealer. It is certainly not a tax on his property generally for it need not appear whether he owns any property or not. Neither can it be a tax on the money invested, for manifestly his gross sales will not measure the amount of money invested during or at the end of the year." *Knisely v. Cotterel, supra*, 617. Moreover, the capital stock tax paid by the plaintiff in error (a Pennsylvania corporation) to the State is a tax upon its property and assets.

> "It has been repeatedly decided, and it is settled law that a tax upon the capital stock of a Company is a tax upon its property and assets."
>
> *Commonwealth v. Standard Oil Co.*, 101 Pa. 119.
>
> See also *Commonwealth v. Bailey, &c., Co., supra.*

If this tax is not a tax upon the property and assets of the plaintiff in error, what is it? The obvious answer is that it is a tax on property sold. If there be no prop-

erty sold, there is no tax assessable and none payable. If there be property sold, the half mill per dollar of property sold, whatever one call it, must actually be a tax upon this property or its sales. Suppose that the plaintiff in error had in stock a large quantity of lubricating oil. So long as this oil remains in the warehouse the mercantile license tax does not reach it, but the moment it is sold the mercantile license tax attaches. Presently we shall have to discuss the question whether or not the mercantile license tax is an occupation tax; but for the present we can only call attention to the circumstance that this tax is payable not because the property is sold in a particular manner, but because it is sold in any manner by any kind of person. Under the Pennsylvania statute property sold upon an exchange has a particular tax attached to it with which we now have nothing at all to do. (Act of May 2, 1899, Sec. 1, P. L. 184.)

Every wholesale vender who does not make his sales upon an exchange is subject to this tax, and we have a decision of this court as to the kind of tax that is. In *Nicol v. Ames*, 173 U. S. 509, a Federal tax on the privilege of selling on an exchange measured by the volume of business was alleged to be a direct tax upon the property sold, and, therefore, invalid as being a direct tax not apportioned among the States. The constitutionality of the act was sustained because "*a tax upon the privilege of selling property at an exchange and using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and primarily upon property.*"

This mercantile license tax is a tax "upon every sale made in any place," and it is a "tax upon property" not because the property is owned, but because it is sold; not a tax on the capital of the vender generally nor upon his capital invested, but upon the prop-

erty which he sells, and not assessable until he does sell it. So long as it remains in his general stock it is free of the tax, and when he sells it the price for which he sells it is the measure of the tax. Just as long as he keeps it stored in his warehouse or other place of deposit, it escapes the tax. When he disposes of it, the tax upon it at once becomes due. The principle governing such a tax is clearly announced in *Coe v. Errol*, 116 U. S. 517. In that case, a personal property tax was levied by a statute of New Hampshire on lumber in the possession of the plaintiff, Coe, in the State. It had been cut in New Hampshire and held at a dam, to be subsequently floated down the river into Maine and sold at various places. The tax was declared to be upon property in bulk, and, therefore, valid. But this Court said: "There must be a point of time when they (the owners' goods) cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose in which they commenced their final movement for transportation from the State of their origin to that of their destination."

To repeat, this mercantile license tax is not a tax upon the property of the Crew Levick Company in bulk. It pays that tax through the assessment of the capital stock tax. It is a tax, moreover, which does not become assessable until the property has been actually sold.

Other precedents are not wanting for the assertion that a tax based upon the amount of sales is a tax upon the property sold. In *Cook v. Pennsylvania*, 97 U. S. 566, this court considered a tax levied by the State of Pennsylvania on auctioneers based on the amount of foreign goods sold by them. Mr. Justice Miller said, "*A tax on sales made by an auctioneer is a tax on goods sold.*" Other cases, which need not be cited here, will be considered more fully further on.

b. A Tax Levied by a State Which Is in Effect a Tax on Goods Sold in Foreign Commerce Is a Regulation of Foreign Commerce and Is Therefore Unconstitutional.

It cannot be for one moment denied by the Commonwealth of Pennsylvania that in the present case the Crew Levick Company is asked by the State to pay a tax based upon the amount of its foreign sales. This is not merely an indirect method of assessing a tax upon foreign commerce, but a direct one—far more so, indeed, than many taxes which have been held to be unconstitutional for like cause. Thus a license tax payable by "drummers" is unconstitutional so far as it is levied on salesmen acting in one State for a vender in another.

Robins v. Shelby Taxing District, 120 U. S. 489.

A tax on auctioneers discussed in *Cook v. Pennsylvania, supra*, is a like example.

A license tax levied by the State of Alabama upon wagons and teams used in delivering sewing machines was held to be unconstitutional where the sewing machine was sold to a place in Alabama from a place in Georgia.

Singer Sewing Machine Co. v. Brickell, 233 U. S. 304.

An ordinance of the borough of Sunbury which made it unlawful to solicit orders for, sell or deliver at retail foreign or domestic goods not of the parties' own manufacture or production without a license is unconstitutional, so far as it requires a license for the sale of goods delivered in the original package from an outside State to the purchaser in Sunbury.

Rearick v. Pa., 203 U. S. 507.

A license tax levied by the city of Titusville upon persons soliciting orders for pictures and frames to be furnished to persons in Titusville by a dealer in Chicago was held to be unconstitutional.

Brennan v. Titusville, 153 U. S. 289.

See also *Davis v. Virginia*, 236 U. S. 697.

A statute of the State of Kansas which provided that before a foreign corporation, even one engaged in interstate business, should have authority to do local business in Kansas, it should pay a charter fee of certain percentages of its entire authorized capital stock, was held to be unconstitutional because a burden upon interstate commerce, as well as because it was a tax upon property not in the State.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1;
Pullman Co. v. Kansas, 216 U. S. 56.

The two cases last cited are to be distinguished from the decision of this court holding constitutional a statute of the State of Kansas which imposed a tax upon a Kansas corporation for the privilege of being a corporation, the tax being based upon its entire authorized capital stock, and this in spite of the fact that a large part of the capital stock was employed outside of the State.

Kansas City Ry. Co. v. Kansas, 240 U. S. 227.

The distinction between the Western Union Telegraph and Pullman Company cases and this last case is that in this last case the tax was the price which the Kansas corporation paid for the privilege granted to

it by the State of being a corporation; *but even this would not have saved the tax if it had fluctuated with the volume of interstate business carried on by the corporation* (p. 235).

Applying *Kansas City Railroad Co. v. Kansas, supra*, to the case at bar, the vice of the mercantile license tax is that it is based not upon the capital employed in the business by the vender, which is the equivalent of the authorized capital stock of the Kansas corporation, but is based upon the amount of his sales, which must necessarily fluctuate with the amount of his foreign sales.

Further comparing the Kansas tax, held to be constitutional, with the Pennsylvania mercantile license tax, these circumstances appear: The Kansas tax is, in the first place, the tax which the Kansas corporation has to pay to come into existence. It is exactly like the bonus upon capital stock, the payment of which is required by a Pennsylvania corporation before it can receive its charter, and it is measured just as the bonus is by the amount of the capital which the State authorizes. The mercantile license tax is levied upon artificial and natural persons alike; and can, therefore, have no relation to the existence of the person taxed. Finally, the Kansas tax, like the Pennsylvania bonus, is absolutely independent of the amount of business transacted, while the mercantile license tax must necessarily fluctuate with the amount of business transacted, and must, therefore, also necessarily vary with the amount of foreign business transacted. Suppose the Kansas tax, instead of being based upon the amount of capital stock authorized by the State, had been based upon the amount of the total gross receipts of the railroad, would calling it an organization tax or a privilege or occupation tax have saved it? The answer must necessarily be "No," for it will appear that:

c. A Tax Which Fluctuates With the Amount of Foreign Sales Is Necessarily a Tax Upon Foreign Commerce and a Regulation of It and Is on That Account Unconstitutional.

Mr. Justice Hughes, who wrote the opinion of this court in *Kansas City Railway Company v. Kansas, supra,* in his conclusion gave in succinct terms his reasons why the tax was not unconstitutional and one of the principal ones was that it did not fluctuate with the volue of interstate business (p. 235). A tax which does fluctuate with the volume of interstate or foreign business is necessarily a tax upon such business, for it is measured by the volume of such business and is a burden upon it. This clearly appears in a number of decisions in this court, and is most forcibly stated by Mr. Justice Holmes in *Galveston, etc., Ry. Co. v. Texas,* 210 U. S. 217. In that case a statute of the State of Texas imposed a tax upon railroad corporations or other persons owning or controlling any line of railroad in the State, the tax to be "equal to one percentum of its gross receipts, if such line of railroad lies wholly within the State." This statute was declared to be unconstitutional, because it necessarily included *gross receipts derived from interstate commerce.*

A Pennsylvania tax on railroad freights, which included freights derived from interstate commerce was held unconstitutional.

State Tax on Railroad Freights, 15 Wall. 232.

A Pennsylvania tax upon the gross receipts of a steamship corporation of that State when such receipts were derived from commerce between the States and with foreign countries was held to be unconstitutional.

Phila. & Southern Mail S. S. Co. v. Penna., 122 U. S. 326.

Galveston, &c., Ry. Co. v. Texas, supra, is particularly interesting and pertinent because it discusses and makes clear the rationale of the decision of this Court in *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217. In the argument of the *Galveston* case it had been insisted that *Phila. & Southern Mail S. S. Co. v. Penna., supra,* had been overruled by *Maine v. Grand Trunk Railway Co., supra,* because in both cases the tax was levied upon the amount of the gross receipts, but this court held, and Mr. Justice Holmes said, that the *Grand Trunk Railway* case was not even a reaction from the *Steamship Co.* case; and his reasons were these (*Galveston, etc., Ry. Co. v. Texas, supra,* 226):

> "The estimated gross receipts per mile may be said to have been a measure of the value of the property per mile. That the effort of the State was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax."

This can be otherwise expressed as follows: Where a State tax, no matter what it is called, is based upon the value of the capital of the person taxed, it does not violate the Federal Constitution, even though the capital be employed in interstate or foreign commerce. Where, however, the tax is based not upon the capital employed, nor is intended to reach the capital employed, but is based upon the receipts or "turn-over"

of the business, if any part of those receipts or "turnover" come through interstate or foreign commerce the tax is invalid.

The Texas tax considered in the *Galveston Railway* case was very much more clearly a franchise tax than is the mercantile license tax, but because it taxed gross receipts, which might include receipts from freight on goods transported in interstate commerce, it was held to be unconstitutional. This case is in every sense a clear and binding authority for the position of the plaintiff in error.

The *Galveston Railway* case, moreover, furnishes an explanation, if any be needed, of *Ficklen v. The Taxing District of Shelby County,* 145 U. S. 1, which was cited in the court below as sustaining the position of the Commonwealth of Pennsylvania, and which was the main buttress of the argument of the Commonwealth in the Supreme Court of Pennsylvania. The facts in that case were these: A statute of the State of Tennessee imposed an individual tax of $50 on "every person or firm dealing in cotton or any other article whatsoever whether as factor, broker, buyer or seller on commission or otherwise," and imposed in addition thereto a tax on the capital invested in the business of any such person, and if there was no capital invested a tax of two and one-half per cent on their gross yearly commissions, charges or compensations for such business. Ficklen and the other appellants in the case were *brokers* and the tax which they sought to escape was that on the amount of their commissions. There was no objection, as a reading of the report of the decision will show, to the fixed tax of $50. The decision was predicated upon the fact that the claimants were *brokers.* There was no determination, for the question was not before the court, concerning any other class of persons. The tax as to these brokers, who contested it, was held to be constitutional, notwith-

standing some of the sales made by the brokers came under the description of interstate commerce. If this case decides that an occupation tax, so-called, where the person using the privilege makes sales in interstate commerce, is valid, it stands by itself in the decisions of this court; but the reason of the decision is perfectly plain. The additional or percentage tax was to be assessed in one of two ways: If the broker employed capital in his business, the assessment was upon the amount of that capital; if he employed no capital, *the assessment was not upon the amount of his sales, but upon the amount of his commissions.* No tax, however, was payable on the commissions, no matter how great, if there was capital employed. Is it not, therefore, entirely plain that the tax in the *Ficklen* case was intended to be, and was, a tax on the value of the capital owned or employed by the broker? The case is cited exactly to this effect by Mr. Justice Holmes in the *Galveston Railway* case. Moreover, Mr. Chief Justice Fuller, in writing the opinion of the court in the *Ficklen* case, said: "We presume that it would not be doubted that if the complainants had been taxed upon the capital invested in the business, such taxation would not have been obnoxious to the constitutional objection, but because they had no capital invested the tax was ascertained by reference to the amount of their commissions, which when received were no less their property than their capital would have been" (p. 24). That is the real distinction: The commissions were the brokers' property; the tax was a property tax, and not a tax upon sales. This can be shown in another way. The value of a man's commercial enterprise may be measured in several ways. One is to take the capital he has employed in it. If he has no capital employed, its value may be ascertained by the amount of his profits or by something that approximates his profits, which is a rough but permissible way of appraising it,

and has the advantage of covering the good will of a going concern. Now, in the *Ficklen* case the tax was primarily upon the capital employed; and it was only where no capital was employed that a tax was laid, not upon the volume of the transactions, but upon the commissions, as a means of reaching the value of the enterprise subject to the tax. It can never for one moment be alleged that the total amount of a man's transactions can furnish an estimate of the value of his business, for the sales may run into millions and the profits be nothing. Judge Simonton, in his opinion in *Knisely v. Cotterel*, puts this well: "It (the mercantile license tax) certainly is not a tax on his property generally, for it need not appear whether he owns any property or not, neither can it be a tax on the money invested, for manifestly his gross sales will not measure or determine the amount of money invested during or at the end of the year."

Just a few words more about the *Ficklen* case. In *Stockard v. Morgan*, 185 U. S. 27, the Court said, speaking of the *Ficklen* case, that the conduct of the complainants had been such that the point which they raised was a little too "fine." It is hardly necessary to point out that a tax must be regarded as a whole (*Galveston Ry. Co. v. Texas, supra*) nor that the *Ficklen* case was decided prior to *Nicol v. Ames, supra*, in which it was held that "a tax upon every sale made in any place" was a tax not upon the sale, but upon the property itself.

There is another thing to be considered. This tax is levied upon sales made. Suppose the Crew Levick Company should acquire products in Oklahoma and sell them to a purchaser somewhere in South America. The merchandise might very well be shipped direct from the point of production to the purchaser; and yet as the sale was made in Philadelphia, it would be

subject to the mercantile license tax under the construction given to the Act by the State Courts, even though the thing sold had never been in the State and was purely a subject of foreign commerce.

d. A Tax Imposed Upon the Manufacture or Production of a Particular Article Is Essentially Different From a Tax Imposed Upon Its Sale. The Former May be Constitutional, While the Latter Is Not.

When this case was argued in the Supreme Court of Pennsylvania much stress was laid upon two decisions, one of a lower Pennsylvania court sustained by the Supreme Court of that State, and the other a decision of this court. The first of these cases is *Commonwealth v. Pennsylvania Coal Co.*, 2 Pearson 402. In the report of this case it is stated that the decision of the lower court was sustained in the Supreme Court of Pennsylvania, but the decision of the Appellate Court is not to be found. The controversy arose over the ninth section of the Act of the Legislature of Pennsylvania, approved May 1, 1868 (P. L. 111). That section provided as follows:

> "That every railroad, canal or transportation company doing business in this state, which possesses the right to mine anthracite coal, or to purchase and sell the same, or to lease from or to other parties the land or mines from which said coal is taken, shall quarterly, on the first days of January, April, July and October, make report, under oath or affirmation, stating the amount of coal mined by them from property owned and leased by them, and also the amount of coal purchased by them, or mined from property owned by them that may be leased to other parties during the preceding three months, and shall pay to the state treasurer, for the use of the commonwealth, within

thirty days thereafter, a tax of four cents upon each and every ton of anthracite coal so purchased or mined."

The Court of Common Pleas of Dauphin County upheld the constitutionality of the tax because "It (*i. e.*, the tax imposed by Section 9) is not imposed on the commerce, but on the commodity mined *before the commerce commenced.*" This citation from the opinion of the court clearly explains the distinction between this case and the one at bar and no further comment is needed.

The second of the cases is *Cornell v. Coyne*, 192 U. S. 418, which arose from the resistance to the tax, levied by an Act of Congress, of one cent a pound upon all "filled cheese" manufactured, the tax to be paid by the manufacturer. Plainly that which makes the tax payable is the act of manufacturing. Now, this court, some time before *Cornell v. Coyne*, had decided that manufacturing was not commerce, and the very case in which this decision was made is cited by the court in *Cornell v. Coyne* (*U. S. v. Knight Co.*, 156 U. S. 1). The *Knight* case, first and last, has been the subject of sufficient comment. The very foundation of the decision in both *Cornell v. Coyne* and the *Knight* case was that manufacturing is not commerce, and that principle alone saved the tax in *Cornell v. Coyne*. If it should turn out that the law now is that manufacturing may be commerce, it is not unlikely that the dissenting opinion in *Cornell v. Coyne* would be held to state the law as it now is. At any rate, taking for granted that *Cornell v. Coyne* is properly decided, the difference between it and the case at bar is upon the surface. It was the manufacturing of the cheese that was taxed; its sale had nothing to do with the tax, and the tax was paid whether the cheese was ever sold or not. In the

case at bar it is the selling which makes the tax payable. Moreover, this Court, in *Cornell v. Coyne*, said: "The exemption (*i. e.*, from duty or impost on exports) attaches to the export and not to the article before its exportation" (p. 427).

e. Even if It be a Franchise or Privilege Tax, the Mercantile License Tax Is Unconstitutional.

It is the incidence of the tax and not the purpose or object for which it is imposed that must determine its constitutionality.

Nicol v. Ames, supra.

So-called franchise or privilege taxes, almost without number, levied by the States have been declared invalid by this court because their result was to impose a burden upon interstate or foreign commerce or to regulate them.

Cook v. Penna., supra;
Brennan v. Titusville, supra;
Robins v. Shelby Taxing District, supra;
Rearick v. Penna. supra;
Davis v. Virginia, supra;
Western Union Telegraph Co. v. Kansas, supra;
Pullman Co. v. Kansas, supra;
Galveston, etc., Ry. Co. v. Texas, supra;
Stockard v. Morgan, supra.

Where a privilege or occupation tax has been upheld by this court it is because the tax does not necessarily fall upon transactions in interstate commerce.

Kansas City Railway Co. v. Kansas, supra;
Ficklen v. Shelby County Taxing District, supra.

Counsel for the plaintiff in error have already mentioned that in *Commonwealth v. Potter, supra,* the Supreme Court of Pennsylvania said of the mercantile license tax prior to the Act of 1899 that "it is a tax; but it is a tax levied on a mode of doing business and not upon persons." (Plaintiff in Error's Brief, p. 11.) *Knisely v. Cotterel defines* it to be a tax upon the business of vending merchandise. Whichever it may be, we have already argued at sufficient length, at perhaps more than sufficient length, that it is a tax upon the property sold. We must, however, call to the attention of the court that there is a very grave doubt that this tax can be called an "occupation" tax. It may be a "privilege" tax in the sense that no one can sell in Pennsylvania at all unless he pays the tax. It may, therefore, meet the definition of a privilege tax. If it does, it offends because it fixes the amount of tax, not upon the capital employed, as in *Kansas City Railway Co. v. Kansas, supra,* but upon the amount of goods sold. If a tax which would prevent a corporation's coming into existence would be invalid because it varied with the amount of interstate or foreign commerce, as in the *Kansas City Railway* case, what is to be said of a tax which is imposed upon all persons, real and artificial, and which is assessed upon the basis of the property sold, even if that property be sold in interstate or foreign commerce.

f. The Mercantile License Tax Assessed in This Case Is Not in the True Sense of the Term a Franchise or Privilege Tax.

The system of mercantile license taxes created in Pennsylvania does undoubtedly contain some examples of a true privilege or occupation tax. Such a one for example is the tax upon eating houses mentioned in *Commonwealth v. Childs Dining Co., supra.* Another is the tax levied upon the privilege of selling goods

upon an exchange. Excluding, however, the few examples in the act and its subsidiary statutes, the act sweepingly assesses a tax upon all persons who sell or vend merchandise, other than from the place where they are manufactured. The only distinction made is that a retail vender pays at one rate and a wholesale vender at another. We repeat that it cannot be said that to permit a man to sell goods in practically any place is to give him a privilege; and we have the warrant of this court for this assertion.

In *Flint v. Stone Tracy Co.*, 220 U. S. 107, the Federal excise tax assessed upon the net income of corporations was in question. As is well known, its constitutionality was sustained upon the ground that it was a tax upon the privilege of doing business as a corporation. "The requirement to pay such taxes involves the exercise of priveleges, and the element of absolute and unavoidable demand is lacking."

> "In the case at bar we have already discussed the limitations which the Constitution imposes upon the right to levy excise taxes, and it could not be said, even if the principles of the Fourteenth Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. *The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals.* These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantage of business controlled and

managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantage of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. *It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals.*" (Italics ours.)

Even if the mercantile license tax were a true privilege tax, it could not for one minute be admitted that such a tax assessed upon the sales, and thus bearing directly upon foreign commerce, would be constitutional; but the tax has not the poor advantage of being a true privilege tax. The plaintiff in error in this case does not pay it because it does business as a corporation. If it were a partnership or an individual it would, nevertheless, pay it.

Strangely enough, *Flint v. Stone Tracy Co.* was cited by the Commonwealth in the argument in the Supreme Court of Pennsylvania, as an authority in favor of the constitutionality of the tax, principally upon the strength of one paragraph in Mr. Justice Day's opinion—that upon page 165, which reads as follows:

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. See in this connec-

tion *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, as interpreted in *Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 226."

Counsel for the plaintiff in error is content to rest his entire case upon the conclusion reached in the paragraph so cited. In order to come within the conclusions of law there stated, there must be two essentials present—first, that the tax is a true privilege tax, and secondly, that the property itself, which is within constitutional inhibition, must be free from taxation. Neither of these requirements is met by the tax now before the court. It is not a true privilege tax; and the property sold in foreign commerce is directly taxed. Not the commissions, not the profits, not the net income derived from the foreign commerce is taxed, but the foreign commerce itself is taxed upon its gross amount.

III. The Mercantile License Tax Is Unconstitutional Because It Is a Duty or Impost Upon Exports Levied by a State Without the Requisite Grant of Authority by the Congress.

The Commonwealth of Pennsylvania does not pretend that the Congress has passed any act which permits the State of Pennsylvania to levy an impost or duty on exports. If the mercantile license tax, so far as it imposes a tax based upon the amount of export sales, is a tax upon exports, it is, therefore, invalid. Without such an Act of Congress the prohibition against a tax on exports is as absolute as a tax on imports. The leading case upon the subject is, of course, *Brown v. Maryland*, 12 Wheaton 419, where a license tax levied by the city of Baltimore upon importers of foreign merchandise was held by Mr. Chief Justice Marshall to be the levying of an impost or duty on imports.

Conversely, where the State of California imposed

a stamp duty upon bills of lading for gold and silver transported from that State out of the State, it was held to be invalid because it was a duty upon exports.

Almy v. California, 24 Howard 169.

(This decision has been questioned, not upon the ground that the stamp duty was not a tax upon exports, but that there may be no prohibition upon the levying of a duty upon exports from one State into another State.)

Not only is a tax of the kinds mentioned in these two cases considered to be a duty or impost upon imports or exports, as the case may be, but it has been repeatedly held by this court:

a. That a Tax Upon an Instrumentality Employed in Exportation Is a Duty or Impost Upon Exports Themselves.

The prohibition against the levying of an impost or duty on exports is as applicable to the Federal Government as to the State Governments; and there are a number of cases in which so-called Federal excise taxes have been declared void because of the prohibition of the Constitution. A stamp duty levied by the War Revenue Act of 1898 on foreign bills of lading was held to be really an impost or duty upon the exports themselves, and therefore unconstitutional.

Fairbanks v. U. S., 181 U. S. 283.

A stamp tax upon charter parties is invalid, where the charter applies to exportation.

U. S. v. Hvoslef, 237 U. S. 1.

A Federal stamp tax on a policy of marine insurance placed on an export cargo was held to be invalid

because the insurance on the cargo was an indispensable element in the carrying on of an export business, and a stamp tax on such was necessarily a tax upon the exportation itself.

Thames Insurance Co. v. U. S., 237 U. S. 19.

b. A Tax Levied Upon Export Sales Is Therefore Necessarily a Duty or Impost on Exports.

What is the position of the defendant in this case, considered with reference to exportations? It has in its possession, for example, a quantity of oil, which so long as it remains in its possession, is not attached by the mercantile license tax. It sells this lubricating oil to a merchant in England, and immediately a tax becomes payable upon the entire value of the oil. It is the sale, the very act which constitutes engagement in foreign commerce, which makes the tax payable. If the oil had remained in the warehouse it would have been free. Selling it, it is taxed. If a tax upon the policies of insurance intended to protect this oil while in process of transportation from Philadelphia to Liverpool is a tax on exports, what can be said of a tax directly upon the goods themselves because they are sold to the foreign consumer? It is pertinent to ask, moreover, what is to be the limit of a tax of this kind? If a small tax be valid so will a large one be; and the principle once established, a State can, under the guise of a tax for the privilege of doing business, subject exports to a tax which will practically put an end to commerce of this kind—the very thing that the Federal Constitution sought to prefent. And if one State can levy a tax of this kind, why not all? If this tax, as levied in this case, be sustained, there will be nothing to prevent a set of burdens upon foreign commerce limited by the desires only of the various States.

Upon this branch of the case, it remains only to mention *Turpin v. Burgess,* 117 U. S. 504. A Federal statute required the affixing of a stamp of fixed value to every package of tobacco in a tobacco factory intended for exportation before its removal from the factory. This was attacked as being an impost or duty on exports. It was held to be constitutional because it was the price paid for the segregation of packages intended for export from packages intended for the domestic trade, the segregation being for the purpose of freeing the packages thus set apart from the Federal excise imposed upon tobacco. Furthermore, the Court said: "The tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation. They might never be exported; whether they would be or not would depend upon the will of the manufacturer." It is not necessary to explain why the Turpin case has no application here.

There is no escape therefore from the conclusion that if a tax imposed upon an instrumentality of exportation is a duty or impost upon exports themselves, a tax imposed directly upon exports and necessarily levied upon them must, of course, be such.

IV. Inasmuch as the Judgment of the Supreme Court of Pennsylvania Included the Amount of a Tax Upon Foreign Commerce, Which Tax Was Also a Duty or Impost on Exports, It Must be Reversed.

The consideration of all the cases bearing upon the question now before the court must unavoidably lead to the conclusion that the tax in controversy in this case is very much more plainly a tax upon foreign commerce and likewise a tax upon exports than many other forms of taxation held to be unconstitutional by this

court. In many of the decisions adverse to State taxation, some of which are on this brief, the effect upon foreign or interstate commerce is much more remote than the Pennsylvania mercantile license tax. It bears directly upon an object which it is forbidden to the States to tax or to regulate; and is therefore, so far as it applies to export sales, unconstitutional.

CHARLES A. FRUEAUFF,
DAVID WALLERSTEIN,
Counsel for Crew Levick Co.,
Plaintiff in Error.

FILED
SEP 26 1917
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 499—October Term, 1917

CREW LEVICK COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR THE DEFENDANT IN ERROR

JOSEPH L. KUN,
Deputy Attorney General.
FRANCIS SHUNK BROWN,
Attorney General.
Attorneys for Defendant in Error.

INDEX.

Page

Argument:
- Question Involved, ... 2
- Contention of Defendant in Error, ... 3
- The Act Imposes a Tax on Business and Not Upon Goods by Reason of Their Sale, ... 3
- Conceding the Tax to be Imposed on Goods, as Plaintiff in Error Contends the Act is Nevertheless Sustainable, ... 14
- Conclusion, ... 19

Statute, ... 1

Table of Cases

Baltic Mining Co. vs. Mass., 231 U. S., 68, ... 13
Coe vs. Errol, 116 U. S., 517, ... 15
Commonwealth vs. Banker Bros. Co., 38 Pa. Super. Ct., 102, ... 6
Commonwealth vs. Pennsylvania Coal Co., 2 Pears. 402, ... 14
Cornell vs. Coyne, 192 U. S. 418 (48 L. Ed. 514), . 16
Ficklen vs. Shelby County Taxing Dist., 145 U. S. 1; (36 L. Ed. 601), ... 517
Flint vs. Stone Tracy Co., 220 U. S. 107 (55 L. Ed. 389), ...11, 12
Galveston vs. Texas, 210 U. S., 217, ... 11
Kansas City Ry. vs. Botkin, 240 U. S., 227, ...10, 13
Knisely vs. Cotterel, 196 Pa., 614, ... 4
Nicol vs. Ames, 173 U. S., 509, ... 7
Turpin vs. Burgess, 117 U. S., 504, ... 16
Western Union Telegraph Co. vs. Kansas, 216 U. S., 1, ... 12
White Dental Co. vs. Mass., 231 U. S., 68, ... 13

IN THE

SUPREME COURT OF THE UNITED STATES

No. 499—October Term, 1917

CREW LEVICK COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR THE DEFENDANT IN ERROR

THE STATUTE

The tax imposed on the Crew Levick Company, the validity of which is challenged, is levied under the Act of Assembly of the Commonwealth of Pennsylvania approved the 2d day of May, 1899, P. L. 184. The provisions of the act pertinent to this case are the first and second sections which read as follows:

"Section 1. Be it enacted, &c., That from and after the passage of this act, each retail vender of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of two dollars, and all persons so engaged shall pay one mill additional on each dollar of the whole volume, gross, of business transacted annually. Each wholesale vendor of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually. Each dealer in or vendor of goods, wares or merchandise at any exchange or board of trade shall pay a mercantile license tax of twenty-five cents on each thousand dollars worth, gross, of goods so sold.

Section 2. And it is provided that all persons who shall sell to dealers in or vendors of goods, wares and merchandise, and to no other person or persons, shall be taken under the provisions of this act [to] be wholesalers; and all other vendors of or dealers in goods, wares and merchandise shall be retailers, and shall pay an annual license tax as provided in this act for retailers."

THE ARGUMENT

The only question involved in this case is whether, under Section 1 of the Act of May 2, 1899, P. L. 184, above quoted, imposing a mercantile license tax, inter alia, on wholesale vendors, there may be included in calculating "the whole volume gross of business tran-

sacted annually'' such portions of business represented by shipments made to foreign countries.

The contention of the defendant in error is that such portion of the business represented by shipments made to foreign countries, may be included in calculating the tax and that such inclusion neither makes the statute a regulation of commerce in derogation of the Federal constitution nor does it render the act obnoxious to Article I, Section 10, Para. 2 of the Federal constitution providiing that ''no state shall, without consent of Congress, lay any impost or duty on imports or exports,'' because—

I.

THE ACT IMPOSES A TAX ON BUSINESS AND NOT UPON GOODS BY REASON OF THEIR SALE.

II.

CONCEDING THE TAX TO BE IMPOSED ON GOODS, AS PLAINTIFF IN ERROR CONTENDS, THE ACT IS, NEVERTHELESS, SUSTAINABLE.

I.

THE ACT IMPOSES A TAX ON BUSINESS AND NOT ON GOODS BY REASON OF THEIR SALE.

It may be pointed out at the outset that the mercantile license tax act of Pennsylvania was passed in 1899, nearly twenty years ago and thousands of dollars in mercantile license taxes have been paid by

wholesale and retail vendors making sales to the customers in foreign countries and other states, in the course of the large volume of business done in that great industrial state. This case raises, for the first time after these many years, the contention that the general mercantile license tax is, as to business represented by foreign shipments, a regulation of foreign commerce and a tax on exports.

It is to be borne in mind that this is a general mercantile license tax levied on all vendors alike and measured by the "whole volume gross of business transacted annually." The tax is not levied on business with non-resident customers as such business; it is not a tax levied on vendors because they do such business; it is not a tax measured solely by such business; but it is an indiscriminate tax falling alike on all persons engaged in the business of selling, whether as wholesaler or retailer or vendor at a board of trade, rated accordingly.

The question of the nature of Mercantile License Tax under the Act of 1899 came before the Supreme Court of Pennsylvania in *Knisely v. Cotterel, 196, Pa. 614. It* was held that the act imposed the tax upon business and not upon property.

Mr. Justice Mitchell, speaking for the Court, said, inter alia, (P. 630):

> "But an examination of the details of the provisions of the present Act makes it clear that the tax, as held by the learned judge below, *is upon the business of vending merchandise,* and that the classification is based on the manner of sale, and within each class a tax is graded according to the gross annual volume of business transacted."

That a State may impose a tax upon business, part of which is transacted with other States, or foreign

countries, without being a regulation of commerce in violation of the Federal Constitution, has been affirmed by the Supreme Court of the United States.

In Ficklen vs. Shelby County Taxing District, 145 U. S. 1; (36 L. Ed. 601), the constitutionality of an act of the State of Tennessee came before the Court. The statute imposed a tax of $50.00 on "every person or firm dealing in cotton or any other article whatsoever, whether as factor, broker, buyer or seller, on commission or otherwise," and in addition an *ad valorem* tax on the capital invested, and if they had "no capital invested they were obliged to pay "two and a-half per cent. on their gross yearly commissions, charges or compensation for said business."

According to the statement by Chief Justice Fuller, on page 4, (L. Ed. 601,) it was averred that— .....

> "All of the sales negotiated by complainant Ficklen were exclusively for non-resident firms, who resided and carried on business in other states than Tennessee, and all the merchandise so sold was in other states than Tennessee, where the sales were made, and was shipped into Tennessee, when the orders were forwarded and filled.
>
> That at least nine-tenths of the sales negotiated and affected by complainants Cooper & Company, and at least nine-tenths of their gross commissions, were derived from merchandise of non-resident firms or persons, and which merchandise was shipped into Tennessee from other states, after the sales were affected."

The Court, in sustaining the tax, said on page 21 (L. Ed. 606):

> "No doubt can be entertained of the right of a State Legislature to tax trades, professions and

occupations in the absence of inhibition in the State Constitution in that regard, and *where a resident engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants of goods situated in another State does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution.*"

It is respectfully submitted that this case is conclusive of our contention, particularly when it is pointed out that there appeared in the case the significant circumstance that the complainants had no capital invested whatever within the State, and the tax was ascertained by reference to the amount of their commissions. Any attempt, therefore, to explain away or distinguish this case on the ground that it involved a question of tax on capital invested, must be futile, and certainly there can be no difference between a license tax "on every dollar of the whole gross volume of business transacted annually" (Act of 1899, supra) and a tax on "gross yearly commissions, charges or compensations" for business transacted, sustained in the case under discussion. If there is a distinction it is a distinction without a difference. In both cases the tax is on the gross amount of business done.

As was said in *Commonwealth v. Banker Bros. Co., 38 Pa. Super. Ct,* page 102, in speaking of the statute now under consideration—

Opinion p. 109:

"Should the tax be regarded as a tax upon a trade or the business of vending merchandise, as it is in Pennsylvania has been held to be, Knisely v. Cotterel, 196 Pa. 614; Commonwealth v. Bailey, Banks & Biddle Co., 20 Pa. Super. Ct. 210, *then*

the power of the state to impose such a tax is sustained by the decision of the Supreme Court of the United States in Ficklen v. Shelby Co. Taxing Dist. 145 U. S. 1."

The plaintiff in error labors hard and long in an attempt to explain the Ficklen case in a manner favorble, or at least not antagonistic to his contention. He says, the tax under consideration in that case was not a tax on sales of property, a statement, the truth of which we readily admit; he asserts that the decision of the court was the effect of the statute as it operated to tax brokers, something which we do not deny; he alleges that if the brokers in question in the case had had capital invested, they could not have been taxed on their commission, a matter which we concede the statute declared. He fails, however, to answer the propositions decided in the case that—

First, A statute imposing a tax on persons selling cotton, merchandise, etc. at a certain rate on their gross yearly commissions is a tax, not on their property, but, upon their engaging in business just as we contended that the Pennsylvania statute, under consideration, operates to tax, not property by reason of its sales or property whatsoever, but the right or privilege to do business.

Second, That the fact that such business done chances to consist in negotiating foreign sales does not necessarily involve the taxation of interstate commerce forbidden by the constitution.

The case of *Nicol* v. *Ames, 173 U. S. 509 (43 L. Ed. 786),* involved the constitutionality of the war revenue Act of 1898. Schedule A of the statute (30 Statutes at Large, 448-458) provided:

"That on and after the first day of July, 1898, there shall be levied and collected and paid for

> * * * upon each sale, agreement of sale or agreement to sell any products or merchandise at any exchange or board of trade or other similar place,—for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent etc."

As to the imposition of a tax on property by reason of its sale, the language of the Federal act above quoted is much stronger than the state statute under consideration. and yet the court decided that the Federal act was *not a tax on property at all but* was a tax on the privilege of making sales and agreements of sale at a Board of Trade, etc.

The Court also said it was entirely proper to make the classification of sales at an exchange, stating that a tax on such sales differed from a tax upon any sale at any place. The Court added, that the latter tax is "really and primarily on property." The plaintiff in error cites this dictum for the contention that the mercantile license tax of Pennsylvania is a tax on property; that the decision of the Supreme Court of Pennsylvania, that it is not a tax on property but a tax on business, a privilege tax on the right to sell, was error.

As will be demonstrated later in this brief, the tax is absolutely and unquestionably sustainable even if regarded as a tax on property. However, it is important to the defendant in error that the thorough and analytical opinion of the Supreme Court of Pennsylvania, in Knisely v. Cotterel, handed down in 1900, holding that it is a tax on business and not on property, be sustained.

In the case of Nicol v. Ames, notwithstanding the tax was "upon each sale, etc.," this court held, as already stated, that it was not a tax on property but upon the privilege of making sales at a Board of Trade. With much respect for the dictum above quoted, it is

submitted that after all it is the right to sell which is the real subject of the tax—it is the privilege which is taxed. How can the *place* of the exercise of the privilege change the character of the tax? The place of the exercise of the privilege does justify the classification and that is what this case decided; that the privilege of selling at an exchange might be taxed because of the peculiar facilities there afforded, whereas the privilege of selling generally may be taxed at a different rate or excluded entirely. That is, we submit, the real rationale of the decision.

By the very section one of the Pennsylvania Mercantile License Tax Act of 1899, which is in issue, wholesale vendors are taxed at one rate, retail vendors at another rate, and vendors at an exchange or Board of Trade at another rate.

Can it be said that as to vendors at an exchange, it is a privilege tax, but as to wholesale and retail vendors generally, it is a tax on property—this same tax? In one sentence of the section it is a privilege tax, in another sentence of the same section, the same tax is a tax on property. Such a view, we submit, is not sustainable.

The conclusion of the Supreme Court of Pennsylvania in the case of Knisely v. Cotterel, supra, that the mercantile license tax is a tax on business, on the privilege of selling and not on the property, is, we submit, entirely correct. In the Ficklen Case, supra, decided by this court, the tax was not limited to "commissions, charges or compensation" on sales at an exchange or Board of Trade, but it applied to all sales at any place. The tax was, nevertheless, sustained as a privilege tax and it was considered immaterial that the measure of tax included sales in interstate commerce.

The plaintiff in error, by reference to a sentence in the case of *Kansas City Ry. v. Botkin, 240 U. S. 227, (60 L. Ed. 617),* at page 235—"It (the tax) does not fluctuate with the volume of interstate business," argues that, as the mercantile license act, in question, is based on the gross volume of business, it must necessarily fluctuate with the amount of foreign business and is therefore invalid. In the case cited, a tax on the authorized capital of a corporation was sustained as a privilege tax although part of the property and lines of the railroad company were outside of the State. The quoted statement was made as one of the many reasons why the tax, in that case, was valid and not to lay down a rule to govern all cases. Indeed it was stated in the very same case (page 233):

> "We have recently had occasion (Baltic Min. Co. v. Mass., 231 U. S. 68, 83) to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own fact;' and if the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

In the Ficklen case, the amount of the tax necessarily fluctuated with the amount of sales made by the complaining broker for non-resident merchants, yet the Supreme Court expressly held that this tax was not a burden on interstate commerce, so that, that is no determining criterion as to a tax on business. Likewise, in Nicol vs. Ames, the more sales, foreign or domestic, which were transacted at the board or exchange, the greater would be the tax and still this statute was held constitutional by no less authority.

The case of *Flint v. Stone Tracy Co., 220 U. S.* 107 (55 L. Ed. 389), while not a case involving the Federal power to regulate commerce, is important in that it indicates clearly the point decided by the Federal Supreme Court in many cases cited by the plaintiff in error. The case involved the corporation tax under the Tariff Act of 1909, the tax being an amount "equivalent to one per centum upon the entire net income from all sources." It was objected that it was a direct tax on property and invalid because not apportioned. It was held, however, that the tax was valid as an excise tax, that it was a tax *not on property*, but on the privilege of doing business. In reviewing the law as defined by prior cases the Court said:

> "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part, at least, property which, as such, could not be directly taxed."

The taxing statute considered in the case of *Galveston v. Texas, 210 U. S. 217 (52 L. Ed. 1031)*, cited by plaintiff in error, was held unconstitutional as pointed out in *Flint v. Stone Tracy Co.*, on page 163 for following reasons:

> "The tax was held void, as its substance and

manifest intent was to tax interstate commerce *as such.*"

No one will seriously contend that a state has the power to pass an act directed against interstate commerce because it is such commerce. As was said by the court, when a state undertakes to single out goods because it is in interstate commerce it directly infringes the Federal right to exclusively regulate such subject. No such attempt is made by the Mercantile License Act of 1899 now before the Court. It does not single out goods and tax them because they are made subject of interstate commerce. We contend that it does not impose a tax upon the goods at all but is a tax upon business.

Plaintiff in error supports his contention by the case of *Western Union Telegraph Company v. Kansas, 216 U. S. 1 (54 L. Ed. 355).* The distinction between the tax in that case and the one imposed by the Pennsylvania statute is clearly indicated by the Court in *Flint v. Stone Tracy Company, supra,* where on page 163, it is said:

> "This Court held (referring to the case of Western Union Telegraph Co. v. Kansas, 216 U. S. 1) looking through forms and reaching the substance of the thing, that the tax thus imposed was in reality a tax upon the right to do interstate commerce within the State, and an undertaking to tax property beyond the limits of the state; that whatever the declared purpose, when reasonably interpreted, the necessary operation and effect of the act in question was to burden interstate commerce and to tax property beyond the jurisdiction of the State, and it was therefore invalid."

The act of the State of Kansas provided, in effect, that before a foreign corporation, including one en-

gaged in interstate commerce, could do a local business in Kansas, it would have to pay, to the State, certain fees. **It singled out, in effect, foreign corporations, those engaged in interstate commerce and inasmuch as it was directed against interstate commerce as such, the Court held the statute must fall.**

This same thought was emphasized in *Baltic Mining Company v. Mass.* and *White Dental Co. v. Mass., 231 U. S. 68 (58 L. Ed. 127)*, and reiterated in *Kansas City Ry. v. Botkin, 240 U. S. 227 (60 L. Ed. 617).*

In the *Baltic Mining Case, at page 83,* the Court said:

> "It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed, in part at least, in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the State, has been sustained."

and at *page 86,* the Court said:

> "An examination of the previous decisions of this Court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce, or to tax property beyond the jurisdiction of the State. In the cases at bar the business for which the companies are chartered is not, of itself, commerce."

In the Kansas Citiy Ry. case, the Court said, *page 233.*

> "We have recently had occasion (Baltic Min.

> Co. v. Mass., 231 U. S. 68, 83), to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own facts;' and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

As already pointed out, the mercantile license tax in question is a general tax on all vendors throughout the State, the amount of tax being measured on the broad basis of the whole volume of gross business transacted annually.

Can it be said, with any reason, that "its substance and manifest intent was to tax interstate commerce as such," or that the tax was "in reality a tax upon the right to do interstate commerce within the State and an undertaking to tax property beyond the limits of the State?" Certainly not.

The mercantile license tax is not a tax on property at all, it is a tax on business, on the privilege of doing business—measured by the gross amount thereof. It is a general tax falling alike on all vendors in the same class. It is in no sense a regulation of, or burden on, interstate commerce or a tax on exports.

II.

CONCEDING THE TAX TO BE IMPOSED ON GOODS, AS PLAINTIFF IN ERROR CONTENDS, THE ACT IS NEVERTHELESS SUSTAINABLE.

In the case of *Commonwealth vs. Pennsylvania Coal Co. 2 Pears. (Pa.) 402,* the company appealed from a settlement by the Accounting Department of the State,

which had charged it with a tax, under the Act of May 1, 1868, on anthracite coal mined in the State. It was objected that the coal taxed had been mined in order to be sent out of the State and sold; that it was so transported and sold; and that its taxation was in violation of the Constitution of the United States, as a regulation of interstate commerce.

HELD:

> "The Act of 1868 imposes the tax on the property and business of the road on the coal mined or purchased before it leaves the ground, not on the commerce or freight carried, * * * It is not imposed on the commerce but on the *commodity* mined before the commerce commenced."

that the tax was lawfully assessed.

This ruling was affirmed by the Supreme Court, February 12, 1876.

In the case of *Coe vs. Errol, 116 U. S. 517 (29 L. Ed. 715)*, it appeared that a large number of spruce logs, that had been cut in the State of New Hampshire, were floated down and placed on the bank of a stream in the town of Errol, New Hampshire, to be from thence floated down the river to the State of Maine to be manufactured and sold. The Selectmen of Errol appraised and assessed the logs for taxation.

The question, therefore, arose whether the products of a State are liable to be taxed like other property within the State, although intended for exportation from the State and partially prepared for that purpose by being deposited at a place of shipment.

The Supreme Court of the United States in an opinion by Mr. Justice Bradley held:

> "Of course they cannot be taxed as exports; that is to say, *they cannot be taxed by reason or*

> *because of their exportation or intended exportation, for* that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any State, without the consent of Congress, from laying any imposts or duties on imports, or exports; and, although it has been decided * * * that this clause relates to imports from and exports to foreign countries, yet, when such imposts or duties are laid on imports or exports from one State to another, it cannot be doubted that such an imposition would be a regulation of commerce among the States, and therefore void as an invasion of the exclusive power of Congress * * * *But if such goods are not taxed as exports, nor by reason of their exportation or intended exportation, but are taxed as part of the general mass of property in the State, at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed?*

And in the case of *Turpin vs. Burgess, 117 U. S. 504, (29 L. Ed. 988)*, it was held that the Constitutional prohibition above quoted has

> "reference to the *imposition of duties on goods by reason or because of their exportation or intended exportation, or while they are being exported.* That would be laying a tax or duty on exports or on articles exported, within the meaning of the Constitution. *But a general tax, laid on all propery alike, and not levied on goods in course of exportation nor because of their intended exportation is not within the Constitutional prohibition."*

In *Cornell vs. Coyne, 192 U. S. 418 (48 L. Ed. 504)*,

an Act of Congress passed June 6, 1896, directed by Section 3 that

> "Manufacturers of filled cheese shall pay four hundred dollars for each and every factory per annum,"

and by Section 9 provided that

> "Upon all filled cheese manufactured there should be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof."

It will be noted that the Act of Congress is somewhat similar to the Pennsylvania Act of 1899, which imposes "a straight tax of $3.00 per annum on wholesale vendors and one-half mill additional on every dollar of the whole volume gross of business transacted annually."

It was contended by the plaintiff in error that the Act was unconstitutional in that it operated to tax filled cheese *which was manufactured by them under contract for export and which was in fact exported.*

The Court, by reference to the case of *Turpin vs. Burgess, supra*, pointed out that "the constitutional prohibition against taxing exports is substantially the same when directed to the United States, as when directed to a State."

The Act was sustained. The Court said, page 426 (L. Ed., page 507):

> "The contention is that inasmuch as this filled cheese was manufactured under contract for export and was in fact exported, the tax of one cent per pound prescribed in Section 9 was prohibited by the 5th paragraph of Section 9, Article 1, of the Constitution, which reads 'no tax or duty shall be laid on any article exported from any state.'

> But this means that *no burden* shall be placed on exportation and *does not require that any bounty be given therfor.*"

The logic of this conclusion is suggested by the observation of the Court in the same paragraph, that

> "to remit on articles exported a tax which is cast upon other like articles consumed at home while perhaps not technically a bounty on exportation, has some of the elements thereof."

The Court further on quotes from the case of *Turpin vs. Burgess, supra,* the accepted rule in these cases, that

> "A general tax laid on all property alike and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition."

The plaintiff in error endeavors to show that the mercantile license tax of 1899 is in "effect" a tax upon property, and because some of its property is sold to non-residents the tax is not applicable to that portion of its business.

But is not that view of the plaintiff in error's case completely and conclusively answered by the decision just cited?

It must be conceded that the Mercantile License Tax Act of 1899, if regarded as a tax on property, is a general tax laid on all property alike and not levied on goods in course of exportation, or because of any intended exportation.

CONCLUSION

Whether the Act imposes a tax upon business or upon property, it does not contravene the provisions of the Federal Constitution. It follows, therefore, that the inclusion by the mercantile appraisers, in calculationg the whole volume gross of the business transacted annually by the Crew Levick Company, of gross amount of shipments made to foreign countries by the company, was not in violation of either of the constitutional provisions referred to.

The judgment of the Supreme Court of Pennsylvania should be affirmed.

JOSEPH L. KUN,
Deputy Attorney General.
FRANCIS SHUNK BROWN,
Attorney General.
Attorneys for Defendant in Error.

CREW LEVICK COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 499. Argued October 17, 1917.—Decided December 10, 1917.

This court determines the constitutionality of a state tax upon its own judgment of the actual operation and effect of the tax, irrespective of its form and of how it is characterized by the state courts.

A state tax on the business of selling goods in foreign commerce, measured by a percentage of the entire business transacted, is both a regulation of foreign commerce and an impost or duty on exports, and is therefore void. *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1, distinguished.

256 Pa. St. 508, reversed.

THE case is stated in the opinion.

Mr. David Wallerstein, with whom *Mr. Charles A. Frueauff* was on the brief, for plaintiff in error.

Mr. Joseph L. Kun, Deputy Attorney General of the State of Pennsylvania, with whom *Mr. Francis Shunk Brown*, Attorney General of the State of Pennsylvania, was on the brief, for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The State of Pennsylvania, by an Act of May 2, 1899, P. L., p. 184,[1] imposes an annual mercantile license tax

[1] "Section 1. Be it enacted, &c., That from and after the passage of this act, each retail vender of or retail dealer in goods, wares and merchandise shall pay an annual mercantile license tax of two dollars, and all persons so engaged shall pay one mill additional on each dollar of

of three dollars upon each wholesale vender of or dealer in goods, wares, and merchandise, and "one-half mill additional on each dollar of the whole volume, gross, of business transacted annually," and like taxes at another rate upon retail venders, and at still another upon venders at an exchange or board of trade. In the year 1913 plaintiff in error sold and delivered at wholesale, from a warehouse located in that State, merchandise to the value of about $47,000 to purchasers within the State, and merchandise to the value of about $430,000 to customers in foreign countries: the latter sales usually having been negotiated by agents abroad who took orders and transmitted them to plaintiff in error at its office in the State of Pennsylvania, subject to its approval, while in some cases orders were sent direct by the customers in foreign countries to plaintiff in error; and the goods thus ordered, upon the acceptance of the orders, having been shipped direct by plaintiff in error from its warehouse in Pennsylvania to its customers in the foreign countries. Under the Act of 1899 a mercantile license tax was imposed upon plaintiff in error, based upon the amount of its gross annual receipts. Plaintiff in error protested against the assessment of so much of the tax as was based upon the

---

the whole volume, gross, of business transacted annually. Each wholesale vender of or wholesale dealer in goods, wares and merchandise shall pay an annual mercantile license tax of three dollars, and all persons so engaged shall pay one-half mill additional on each dollar of the whole volume, gross, of business transacted annually. Each dealer in or vender of goods, wares or merchandise at any exchange or board of trade shall pay a mercantile license tax of twenty-five cents on each thousand dollars worth, gross, of goods so sold.

"Section 2. And it is provided that all persons who shall sell to dealers in or venders of goods, wares and merchandise, and to no other person or persons, shall be taken under the provisions of this act [to] be wholesalers; and all other venders of or dealers in goods, wares and merchandise shall be retailers, and shall pay an annual license tax as provided in this act for retailers."

gross receipts from merchandise shipped to foreign countries. The Court of Common Pleas of Philadelphia and, upon appeal, the Supreme Court of the State (256 Pa. St. 508) sustained the tax, overruling the contention that it amounted to a regulation of foreign commerce and also was an impost or duty on exports levied without the consent of Congress, contrary to §§ 8 and 10 of Art. I of the Constitution of the United States.[1]

Whether there was error in the disposition of the federal question is the only subject with which we have to deal.

As in other cases of this character, we accept the decision of the state court of last resort, respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts. *Galveston, Harrisburg, & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 362; *Kansas City &c. Ry. Co.* v. *Kansas*, 240 U. S. 227, 231.

In this case, however, the characterization of the tax by the state court of last resort is a fair index of its actual operation and effect upon commerce. Soon after the passage of the act, in *Knisely* v. *Cotterel*, 196 Pa. St. 614,

[1] Literally, the objection was that a tax based upon the gross receipts for merchandise shipped to foreign countries would be a "tax levied by the *United States of America* upon commerce with foreign nations, in violation of Article I, Section 8, of the Constitution of the United States, and would also be an impost or duty on exports levied by the State of Pennsylvania without the authority of an Act of Congress in violation of Article I, Section 10, of the Constitution of the United States." The description of the tax as "levied by the United States of America" evidently was a slip, and so understood by both courts, as appears from the opinion of the Court of Common Pleas (unreported), of which only the conclusion is quoted in the opinion of the Supreme Court.

that court was called upon to construe it and to answer objections raised under the constitution of the State and the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, and in the course of an elaborate opinion declared (p. 630): "An examination of the details of the provisions of the present act makes it clear that the tax, as held by the learned judge below, is upon the business of vending merchandise, and that the classification is based on the manner of sale, and within each class the tax is graduated according to the gross annual volume of business transacted. This is apparent from the fact that the amount of the tax over the small fixed license fee is determined in every case by the volume of business, measured in dollars, and the rate at which it is to be levied is according to the manner of sale."

The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given.

We are constrained to hold that the answer must be in the affirmative. No question is made as to the validity of the small fixed tax of $3 imposed upon wholesale venders doing business within the State in both internal and foreign commerce; but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of

it; and, for the same reason, to be in effect an impost or duty upon exports. This view is so clearly supported by numerous previous decisions of this court that it is necessary to do little more than refer to a few of the most pertinent. *Case of the State Freight Tax*, 15 Wall. 232, 276–277; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489; *Fargo* v. *Michigan*, 121 U. S. 230, 244; *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 336; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648; *McCall* v. *California*, 136 U. S. 104, 109; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 227.

Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned.

The principal reliance of the Commonwealth is upon *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1. Undoubtedly that case is near the border line; but we think its authority would have to be stretched in order to sustain such a tax as is here in question. Consistently with due regard for the constitutional provisions, we are unable thus to extend it. In that case the complaining parties were established in business within the taxing district as general merchandise brokers, and had taken out general and unrestricted licenses to do business of all kinds, both internal and interstate. As it happened, one of them (Ficklen), during the year in question, did an interstate business exclusively, and the other (Cooper & Co.) did a business nine-tenths of which was interstate. And the court, by Mr. Chief Justice Fuller, said (p. 21): "Where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution;" and again (p. 24): "What position

they [the plaintiffs in error] would have occupied if they had not undertaken to do a general commission business, and had taken out no licenses therefor, but had simply transacted business for non-resident principals, is an en- entirely different question, which does not arise upon this record." Besides, the tax imposed in the *Ficklen Case* was not directly upon the business itself or upon the volume thereof, but upon the amount of commissions earned by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional.

In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 695, the court, again speaking by Mr. Chief Justice Fuller, said: "It is settled that where, by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained."

The tax now under consideration, so far as it is challenged, fully responds to these tests. It bears no semblance of a property tax, or a franchise tax in the proper sense; nor is it an occupation tax except as it is imposed upon the very carrying on of the business of exporting merchandise. It operates to lay a direct burden upon every transaction in commerce by withholding, for the use of the State, a part of every dollar received in such transactions. That it applies to internal as well as to foreign commerce cannot save it; for, as was said in *Case of the State Freight Tax*, 15 Wall. 232, 277, "The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State." That portion of the tax which is measured by the receipts from foreign commerce necessarily varies in proportion to the

volume of that commerce, and hence is a direct burden upon it.

So obvious is the distinction between this tax and those that were sustained in *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335, 347; *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 87; *Kansas City &c. Ry. Co.* v. *Kansas*, 240 U. S. 227, 232, 235; and some other cases of the same class, that no time need be spent upon it.

The judgment under review must be

Reversed.